TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1[redacted] 1925

No. [redacted] 78

LIVE OAK WATER USERS' ASSOCIATION, BUTTE COUNTY FARM BUREAU, SUTTER COUNTY FARM BUREAU, ET AL., PLAINTIFFS IN ERROR,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA AND SUTTER-BUTTE CANAL COMPANY

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

[redacted]

(30,368)

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No. 409

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IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1] **IN SUPREME COURT OF CALIFORNIA**

LIVE OAK WATER USERS' ASSOCIATION, BUTTE COUNTY FARM Bureau, Sutter County Farm Bureau, California Farm Bureau Federation, C. W. Thresher, and W. G. Coppernoll, Petitioners and Plaintiffs in Error,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and Sutter-Butte Canal Company (a Corporation), Respondents and Defendants in Error

JOINT PRÆCIPE AND STIPULATION

To B. Grant Taylor, Esquire, Clerk of the Honorable the Supreme Court of the State of California:

The above named parties join in this Præcipe and Stipulation for the preparation of the transcript of the record on Writ of Error herein, and as the Clerk of Supreme Court of California you are requested and directed to transmit to the Clerk of the Supreme Court of the United States at Washington, D. C., duly certified and authenticated and within the time, as prescribed by the rules and practice of the Supreme Court of the United States, the following documents, which the parties herein stipulate constitute the record to be used on the Writ of Error to the Supreme Court of the United States in the above entitled matter:

1. This Præcipe and Stipulation.

2. The Petition to the Supreme Court of the State of California, filed on the 21st day of June, 1922, by the above named plaintiffs in error as petitioners, against the above named defendants in error as respondents, for a Writ of Review, of that certain proceeding [fol. 2] before the Railroad Commission of the State of California, entitled In the Matter of the Application for Increased Water Rates by the Sutter-Butte Canal Company, a corporation, and the order and decision therein made by said Railroad Commission on the 26th day of April, 1922, which said decision is numbered 10372 in the records and files of said Railroad Commission, together with all exhibits appended thereto and endorsements upon said Petition for Writ of Review.

3. The Writ of Review issued out of the Supreme Court of California upon its order allowing said Writ of Review, together with the return upon the same.

4. The agreed statement transmitted herewith constituting and fully and truly containing all of the record of the proceedings before the Railroad Commission of the State of California certified by said Railroad Commission to the Supreme Court of the State of California on said Writ of Review as the parties acting by their respective attorneys have stipulated to be pertinent to the questions to be

presented by and upon the Writ of Error herein to the Supreme Court of the United States; and said statement is marked A; it is expressly referred to and made a part hereof, and by cross reference the Stipulation at the head of said agreed statement expressly refers to this paragraph, and said statement is to be considered as though set forth in full at this place.

5. The opinion and the decision of the Supreme Court of California rendered on said Writ of Review on the 8th day of January, 1923.

6. The agreed summary of the respective Respondents' Petition to the Supreme Court of California for Rehearing on said last mentioned opinion and decision of the said Court; of the Petitioners' Opposition thereto; of the Petitioners' Memorandum of Authorities on Jurisdiction; and the Respondent's replies thereto; all filed in said Supreme Court of California; which said summary is transmitted herewith and is marked B; it is referred to and made a part hereof and by Stipulation at the head of said summary expressly refers to this paragraph and said summary is to be considered as [fol. 3] though set forth in full at this place.

7. The order of the Supreme Court of the State of California granting a rehearing.

8. The opinion and decision of the Supreme Court of the State of California in the above entitled case on said Writ of Review rendered on the 21st day of September, 1923, after rehearing granted.

9. The agreed summary of the Petitioners' Petition for Rehearing on said opinion and decision of the Supreme Court of the State of California, rendered on the 21st day of September, 1923; which said summary is transmitted herewith and is marked C; it is referred to and made a part hereof and by Stipulation at the head of said summary expressly refers to this paragraph and said summary is to be considered as though set forth in full at this place.

10. The order of the Supreme Court of California denying said last mentioned Petition for Rehearing.

11. The Remittitur of the Supreme Court of the State of California issued on the 23rd day of October, 1923, transmitting said opinion and decision rendered on the 21st day of September, 1923, which said Remittitur it is stipulated evidences the fact that said opinion and decision became final and conclusive on the 21st day of October, 1923, and said opinion and decision thereupon became and is the final judgment of said Supreme Court of the State of California on said Writ of Review and is the judgment upon which this Writ of Error was granted.

12. The Petition for Writ of Error, with all endorsements thereon.

13. The Assignment of Errors, together with all endorsements thereon.

14. The bond on approval.

15. The Order Allowing Writ of Error, with all endorsements thereon.

[fol. 4] 16. The Writ of Error, with all endorsements thereon.

17. The Citation in Error, with proof of service and all endorsements thereon.

18. The certificate of the Clerk of the Supreme Court of the State of California.

Dated this 5th day of May, 1924.

T. S. Brittain, Attorney and Solicitor for Plaintiffs in Error. Hugh Gordon, Carl I. Wheat, Attorneys and Solicitors for Defendants in Error The Railroad Commission of California. Devlin & Brookman, Isaac Frohman, Attorneys and Solicitors for Defendants in Error, Sutter-Butte Canal Company (a Corporation).

[fol. 5] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR WRIT OF REVIEW—Filed June 21, 1922

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of California:

Your petitioners above named allege that:

I

The respondent, the Railroad Commission of the State of California, hereinafter designated as "the Commission" has exceeded its powers in the manner and in the proceeding to which reference is hereinafter made and as hereinafter set forth.

II

The respondent, Sutter-Butte Canal Company, hereinafter designated as "the Company," is and for many years last past has been a corporation, engaged in the business of appropriating, selling and distributing water for irrigation purposes as a public utility in the counties of Butte and Sutter in this State. In carrying on its business as such public utility the Company is and at all times herein mentioned was subject to the provisions of the Public Utilities Act, and to the regulation, supervision and control of the Commission, in accordance with the provisions of said Public Utilities Act.

[fol. 6]

III

At all times herein mentioned your petitioners, C. W. Thresher, and W. G. Coppernoll have been and now are residents of the said County of Butte, and each of them is a consumer of water supplied and sold to them respectively by and is a rate payer of the Company. Said petitioners file this petition for themselves not alone, but for all other consumers of water and rate payers of the Company who are similarly situated and affected injuriously by the orders and acts of the Commission hereinafter set forth.

IV

At all times herein mentioned your petitioner, Live Oak Water Users Association has had and now has its principal place of business in Sutter County and the members of said association are all consumers of water of the respondent Company.

V

At all times herein mentioned your petitioner the California Farm Bureau Federation has been and now is an unincorporated association, having its principal office in Hilgard Hall, at the University of the State of California, and composed of County Farm Bureaus represented in said Federation by regularly elected delegates, denominated "directors," from each of said County Farm Bureaus. In the counties of Butte and Sutter, in which the Company operates as a public utility, there is a regularly organized Farm Bureau, and each of them is a member of said California Farm Bureau Federation. Each of said County Farm Bureaus is a petitioner herein, and joins in this petition in behalf of its members who are affected by this decision in the same manner as the individual petitioners herein. Every such County Farm Bureau is an unincorporated association of persons engaged in agricultural pursuits in the respective counties, and the aggregate membership of said County Farm Bureaus, represented in and by your petitioner the California Farm Bureau Federation, who are consumers of water supplied by and who are rate payers of the Company, and who are injuriously affected by the acts, rulings and orders of the Commission as herein-

[fol. 7] after set forth, numbers several hundred persons, on whose behalf and in its representative capacity and as whose agent your petitioner, the California Farm Bureau Federation, joins in this petition.

VI

Under modern conditions of life, and in the region in which water is served by the Company, water is a necessity of agricultural life and for the production of field crops and fruit by irrigation. Unless such water is supplied by the Company at rates which are fixed by the Commission in accordance with law and in the exercise of its lawful discretion, acting within its powers, the said agri-

culturists will suffer injury not to be adequately measured in money. If the acts, rulings and orders of the Commission of which complaint is herein made, and which were and are beyond the powers of the Commission, and not in the exercise of any discretion whatever, are permitted to stand, your petitioners Thresher and Coppernoll, and all others similarly situated, will be grievously injured and subjected to great and irreparable loss and damage, and, except by review herein sought they are without any remedy at law whatsoever.

VII

The individual petitioners are and at all times herein mentioned were purchasers of water from the Company or its predecessors in interest under certain contracts entered into between said petitioners and the Company or its predecessors at various dates between the first appropriation in 1902 and 1913.

VIII

In 1902, one, Fleming, filed notice of appropriation for sale and distribution of a certain quantity of water on the Feather River at a point of diversion near the town of Oroville. Said Fleming thereafter transferred all his rights under said appropriation to one McCallum. In 1903 the Butte County Canal Company was incorporated and as a public utility it acquired from said McCallum the rights held by him to appropriate, distribute and sell said water. Said [fol. 8] Butte County Canal Company sold water rights contracts to owners of from 10,000 to 15,000 acres of land lying generally south and west of said point of diversion.

IX

Said Butte County Canal Company thereafter diverted the water appropriated as aforesaid, and sold and delivered the same to said holders of said water right contracts until 1911. In said last mentioned year the Sutter-Butte Canal Company was incorporated and acquired the plant and water rights of said Butte County Canal Company and assumed its obligations under said water right contracts and as a public utility. Coincident with the development aforesaid various land companies were organized, and said companies acquired water right contracts from said Sutter-Butte Canal Company and its predecessors in interest and sold lands and water rights to land purchasers within the area susceptible of irrigation. In most cases said land companies organized mutual ditch or water companies, and said ditch and water companies purchased water from the respondent company, or its predecessors, for distribution on said lands. From time to time said land companies and ditch and water companies were acquired by the respondent company, and it now owns or controls all the canals and ditches of said companies, except a small portion embraced within a certain district known as "Gridley Colony Ditch No. 1."

X

The contracts for water service varied in certain respects, some were based upon an initial charge, in some instances of $5.00 per acre of land owned by the consumer and in others the initial charge was $10.00 per acre of land owned by the consumer. Still other contracts made no provision for any initial charge. The contractual rate for service in addition to such initial charge ranged from fifty cents to two dollars per acre of land owned by the consumer. All charges based on acreage as fixed by such contracts were made without regard to the acreage actually irrigated or susceptible of irrigation. Each of such contracts, as your petitioners are informed and believe, and on such information and belief, aver, in terms made [fol. 9] it obligatory upon the consumer to maintain the service ditch to his own land, and gave to the water utility company the right to take over and operate each such ditch, with the right of way over the consumer's land for, and to operate such ditch. Each such contract *proported* to make the water designated in the contract appurtenant to the land referred to in such contract, and provided that the water and water rights might be conveyed with and by a conveyance of the land to which such contract referred. Each such contract in terms provided that in the event or default of payment of the amounts specified therein to be paid by the contract holder, the other party thereto, or its successor in interest, should have a lien upon the entire acreage of land mentioned in each such contract respectively for such charges with added interest and costs. The holders of said water right agreements paid the charge specified in their respective contracts to the utility company making water service in accordance with said contracts from the date of such contracts respectively until March 25, 1918.

XI

In 1917 the Company applied to the respondent Commission for an order permitting the Company to increase its then existing rates, and public hearings were held by said Commission in said matter in June, November and December, 1917. At said hearings evidence was introduced in regard to said contracts as set forth in Paragraph X of this petition, and the Commission was informed of all of the terms and conditions contained in said contracts, and particularly of the terms requiring the payment by said consumers of an annual charge on the entire acreage specified in each of said contracts.

XII

Thereafter and on the 25th day of March, 1918, said Commission rendered its decision in said matter which said decision is designated in the records of said Commission as Decision No. 5227 (15 C. R. C., 425, 449) and in said Decision the said Commission determined that:

"Under the present rates one consumer may be paying $1.00 annually per acre while his neighbor is paying $1.50 or $2.00 per

[fol. 10] acre for the same service. This discrimination is due to the fact that the predecessor of the Sutter-Butte Canal Company issued contracts providing for a $1.00 and $1.50 rate while the canal company issued its contracts for $2.00 for the same class of service.

"That the Commission cannot permit this discrimination to continue is obvious. The rates to be established in this proceeding must be uniform and nondiscriminatory in their application.

"The revenue of this company will be materially reduced by the elimination of the area which has heretofore been paying an annual charge but has not used water for irrigation, and which does not carry the initial charge payment.

"This phase was discussed by Commissioner Thelen in Decision No. 4478, In the Matter of the Application of Madera Canal and Irrigation Company for an order authorizing increases in rates, charged for water sold for irrigation, Application No. 2381, decided July 23, 1917, who states in part as follows:

"This Commission has jurisdiction to establish the rate to be paid for water sold by a public utility or the rate to be paid by a customer desiring to establish the relationship of customer and utility, (a minimum rate for readiness to serve) but not a rate to be paid by a person who does not desire to purchase water or to be placed in the status of customer of a public utility water company with the right to call on the utility for water whenever he desires to do so."

In and by said Decision the said Commission established schedules of rates as set forth below, stating that the Company asked that both a flat rate and a measured schedule be established having it optional with either party whether or not a measuring device be installed. No measuring device was installed by the Company. The schedules so adopted were as follows (15 C. R. C. 425, 452):

"Flat Rate:

Rice, $7.00 per acre per year.
Grain irrigation, 50 cents per acre irrigation.
Plowing for water grass, first irrigation $1.00 per acre; subsequent irrigation, 50 cents per acre per irrigation.
All other crops, $2.50 per acre per year.

Measured Rate (rice irrigation):

Where water is measured, the rate shall be as follows:
Minimum charge per acre per year—
Rice irrigation, $4.00 for 3 acre-feet or less.
Grain, water grass or plowing, 75 cents for ½ acre-foot or less.
All other crops, $2.00 for 1½ acre-feet or less.
Excess at the rate of $1.25 per acre-foot.

In and by said Decision it was further stated and determined that (15 C. R. C. 425, 453-454):

[fol. 11] "I can see no reason why these contract rates should not be continued in effect without discrimination if a rate schedule

be established that will permit of a prospective consumer receiving the same rate by paying an initial charge or paying a higher rate if without this charge. I believe it would, but work justice to those consumers of the canal company who have paid this initial charge to establish the lower rate. The existing discrimination between the various contract holders should be removed, however, and I recommend that in addition to the schedule set out above there be established a rate schedule including an initial charge.

"Of the 40,943 acres under contract, slightly in excess of 30,000 have contracted at the $2.00 per acre rate. All the contracts for rice irrigation provide for the payment of $5.00 per acre per year.

"The rate of $5.00 for rice irrigation and $2.00 for all other crops with an initial payment of $10.00 is substantially in accord with the rule declared in the Cuyamaca case, supra.

"I find as a fact that the following are just and reasonable rates:

Initial payment	$10.00 per acre.
Rice irrigation	$5.00 per acre per year.
All other crops	$2.00 per acre per year."

In and by said Decision No. 5227 the said Commission further approved the rules adopted by said Company, which provided among other things that:

"1. Applications for water must be made on the printed forms of the Company and filed with the Company not later than January first of the year in which service is desired, except that in case it is necessary to construct, extend or enlarge any ditch in order to serve, application must be made on or before October first preceding the year in which service is desired."

and further that:

"17. Water must be used only on the area described in the application. For violation of this rule, water will be turned off and service will not be restored until payment is made at the established rates for the area described in application, plus other area irrigated.'

A copy of the form of application referred to in said rules is appended hereto and marked Exhibit "D."

XIII

Thereafter each of these consumers in pursuance to the decision of said Commission offered to pay the Company at the rate set forth in said Schedule No. 3, for the number of acres upon which each of these consumers desired water during any particular year, and the Company has at all times refused to accept said offer, but has demanded and received payment of the rates so established upon the entire acreage as specified in each of said pre-existing contracts, and [fol. 12] has coerced its contract consumers to pay for water not used by them at rates in excess of those fixed by contract and applied to lands never irrigated.

XIV

On November 5, 1921 the Company filed its application with the Commission setting forth that since said Decision No. 5227 said Company had spent large sums for additions and betterments and improvements upon its system, that its rates were insufficient to pay maintenance and operating charges with allowance of a reasonable amount for depreciation and a fair return on its investment.

XV

Public hearings were held by said Commission in said matter during the months of December, 1921, and January, 1922. During said hearings evidence was introduced and not in any way controverted showing the matters and things set forth in paragraphs XII and XIII of this petition, and particularly that the Company was then and at all times after the date when said Decision No. 5227 became operative and effective had been demanding and receiving of consumers of water and of your individual petitioners and all others similarly situated sums of money for water served computed in accordance with the schedules fixed by said Decision No. 5227, by the application of the rate per acre of land irrigated and served with water, and in addition thereto large sums of money by the application of the said schedule rates to many thousands of acres of land upon and to which no water was served by the Company and which was not irrigated.

XVI

Your petitioners expressly admit that the Commission has power to fix rates for water used by consumers served by the Company; they deny that the Commission has power to make new contracts for them with the Company in regard to water not served by the Company; and, they deny that the Commission has power to authorize or to permit the Company, exercising the functions of a public utility, to [fol. 13] charge, demand and compel the payment of any sum of money of its consumers for water not served or at any rate based upon the acreage of land to which no water is delivered under said rules established by the Company and approved by the Commission.

XVII

Thereafter and on April 26th, 1922, the Commission rendered its Decision No. 10372 in said matter, authorizing an increase in rates for water service of said Company, and in and by said decision the Commission, in the opinion of your petitioners, exceeded its jurisdiction in its attempting to determine that the Company might collect, as a public utility, moneys from consumers for service not rendered in the matters and as hereinbefore set forth. Said attempted determination was in the words and figures following:

"Another group of consumers holding contracts similar to those just referred to take a totally different position and urge that as to them applicant is a public utility and the former action of the Commission, fixing rates different from those specified in their contracts, has resulted in the complete abrogation of these contracts in all particulars. We think this contention is also unsound. It is well settled in this state that contracts of this sort are subject to revision. To the extent that the rates for water are changed by the orders of the Railroad Commission these contracts are modified or reformed but not wholly superseded or abrogated. Other provisions of such contracts may remain in full force and effect.

Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 298.

"The reason these consumers desire that their contracts be completely annulled is that the contracts contain a provision for continuous service of water for the entire acreage for which water was contracted, irrespective of whether water is or is not actually used on the lands covered by the contracts. In other words, they are required by their contracts to pay a certain amount per acre per year even though part of the acreage may remain uncultivated and no water used. Under these contracts, on the one hand the company must hold itself in readiness to serve the entire acreage covered by the contracts, and hence is not free to dispose of, to any one else, the water necessary to do this, and on the other hand the consumers are required to pay for the full acreage involved irrespective of whether the entire acreage be irrigated in each year.

"In this connection, it is urged that in the Decision of the Commission, No. 5227, 15 O. & O. R. R. Co., 425-450, the provision requiring payment for acreage on which water was not actually used was set aside. However, we think a reading of the entire opinion in that case will not bear out this contention. The order itself provided for three distinct classes of rates:

1. A flat rate for consumers not holding contracts.
2. A measured rate to apply where meters were installed.
3. A flat rate for holders of contracts.

[fol. 14] "The order clearly shows that the contract holders were treated as a separate class of consumers and the Commission deemed that, except as to the change in rates, the contracts remained in full force and effect.

"If the entire system were metered, as has been recommended, by the Commission, and all water was paid for on a measured basis, a situation might be presented which would justify the elimination of the annual acreage charge on unirrigated lands. Under present conditions, however, we believe that this charge is justified, and the Commission will not, therefore, prescribe a rate which will supersede this provision of the contract."

A copy of said decision is appended hereto, expressly made a part hereof and marked Exhibit "A."

XVIII

It is not true and there is no evidence in the record that any of these petitioners contended or now contend that said Decision No. 5227 resulted in the abrogation of their or any of their said contracts. These petitioners allege and in the said proceeding at all times maintained, and now maintain that each of said contracts was and still is entirely legal, and, that when the State, by the agency of said Commission under Article XIV, Section I of the Constitution of California, undertook to fix rates for water service by the respondent Company, each of said contracts was as to further dealings between the parties superseded by the rates established by the said Commission for water service by said Company.

XIX

Thereafter and within the time allowed by law therefor your petitioners by their undersigned counsel served upon the parties to said proceeding and particularly upon the Sutter-Butte Canal Company, and filed with the Commission their petition for rehearing in said matter, setting forth their objections to said decision in the particular matters next hereinafter set forth:

1. That the findings that these petitioners contend that the contracts have been abrogated is contrary to the only evidence in the case and is beyond the jurisdiction of the Commission;

2. The finding of the Commission that the Company must give a preference to these consumers in the service of water and in turn [fol. 15] that the consumers must pay for the entire acreage irrespective of use of water, is unlawful and beyond the jurisdiction of the Commission; and

3. The finding that the Commission intended to treat these contract holders as a separate class, and as to them, the increase in rates applied to the entire acreage under contract is unlawful and beyond the jurisdiction of the Commission, in that it is an attempt on the part of said Commission to make a new contract for the parties. A copy of said petition for rehearing is appended hereto, made a part hereof and marked Exhibit "B."

XX

Thereafter and on the 22nd day of May, 1922, the said Commission made its order denying said petition for rehearing and a copy of said order is appended hereto and made a part hereof and marked Exhibit "C."

XXI

Each and every of the said findings of facts and conclusions of law contained in said Commission's decision in regard to the matters herein set forth, in the opinion of the petitioners, is unjust, unlawful and beyond the power of the Railroad Commission of the

State, and these petitioners have no appeal from said order and have no plain, or speedy or adequate remedy other than by Writ of Review.

XXII

These petitioners are parties interested in this proceeding, and the Sutter-Butte Canal Company is the party whose interest will be directly affected by such review.

XXIII

Wherefore, your petitioners make application to this Honorable Court to grant them a Writ of Review requiring said Railroad Commission of the State of California to certify fully to this Honorable Court, at a specified time and place, a transcript of the record and [fol. 16] proceeding before said Commission in the matter of said proceeding, numbered on its filed, Application 7317, to the end that the said order and decision be reviewed by the Court, and that, upon such review such order and decision of said Railroad Commission be annulled and set aside, insofar as the same makes provision for the collection of rates upon any acreage other than that upon which water may be desired by these petitioners.

F. S. Brittain, T. C. Nelson, Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 17] Jurat showing the foregoing was duly sworn to by Frank S. Brittain; omitted in printing.

[fol. 18] EXHIBIT "A" TO PETITION

Decision No. 10372

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Application No. 7317

In the Matter of the Application of THE SUTTER-BUTTE CANAL COMPANY, a Corporation, for an Increase in Rates

Devlin & Brookman, By Douglas Brookman and Henry Ingram, for applicant.

I. J. Truman, Jr., for Sutter Water Users' Association.

F. S. Brittain, for Live Oak Water Users' Association, Butte County Farm Bureau, California Farm Bureau Federation, C. W. Thresher, W. G. Coppernoll, L. E. Wallace et al.

George F. Jones, for Butte County Water Users' Association and A. J. Lofgren.

Thomas D. Reed, for S. A. Mealey *et* al., being water users served by Gridley Colony Ditch No. 1.

King and King, by Mrs. J. R. King, for J. R. King, J. P. Hopkins et ux. Robert A. Room et ux., and W. E. Gibson.
J. M. McGee, in propria persona.

OPINION

MARTIN, Commissioner:

Sutter-Butte Canal Company, an incorporated public utility engaged in the business of furnishing water for irrigation purposes to certain areas in Butte and Sutter Counties, California, makes application for an increase in rates.

The application alleges in effect that the rate schedule for this utility at present in effect was established by Decision No. 5227 of this Commission, rendered March 25, 1918; that said rates were intended to produce an annual revenue sufficient to meet the annual charges of the utility as set out in said decision and allowed as reasonable as of that date; that since said decision the actual maintenance and operation expenses and the actual depreciation upon the physical [fol. 19] properties have increased considerably, also, that there has been an added expenditure in enlargements, extensions and improvements to the physical properties, totaling $1,071,452.70 as of October 1, 1921. By reason of these facts, it is claimed that the rates at present in effect are non-compensatory and inadequate to yield the revenue to which applicant is entitled to meet the necessary annual charges. Applicant asks for an order of this Commission authorizing an increase in rates.

Public hearings were held at Gridley, of which all interested parties were duly notified and given an opportunity to appear and be heard. At the hearing the records and files of the previous proceedings before the Commission involving this utility were admitted in evidence as far as relevant to the issues in this proceeding.

Preliminary to a discussion of the reasonableness of the rates, we will refer briefly to other phases of the proceeding concerning jurisdiction, interpretation of contracts, and similar matters, developed at the hearing.

A certain group of consumers claimed to be the holders of private contracts entitling them to receive water at specified rates different from those fixed by the Commission. It was urged that as to the water alleged to be covered by these contracts, the applicant is not a public utility and the rates fixed by such contracts cannot be changed.

This contention cannot be upheld. The Sutter-Butte Canal Company "was organized, as, and has always been, a public utility company."

> Butte Co. Water Users' Ass'n v. Railroad Commission, 61 Cal. Decs. 317, 185 Cal. 218.

In addition to the evidence relative to this question adduced at former hearings before the Commission (and which it was stipulated might be considered here) it was shown that prior to the execution of the contracts in question applicant exercised the power of eminent domain and acquired, by condemnation, the right of way for one of

its main canals. It is from this canal that these protestants receive [fol. 20] their water. Furthermore, it appears that all consumers have paid the increase in rates granted applicant by the Commission on March 25, 1918.

Another group of consumers holding contracts similar to those just referred to take a totally different position and urge that as to them applicant is a public utility and the former action of the Commission, fixing rates different from those specified in their contracts, has resulted in the complete abrogation of these contracts in all particulars. We think this contention is also unsound. It is well settled in this state that contracts of this sort are subject to revision. To the extent that the rates for water are changed by the orders of the Railroad Commission these contracts are modified or reformed but not wholly superseded or abrogated. Other provisions of such contracts may remain in full force and effect.

Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 298.

The reason these consumers desire that their contracts be completely annulled is that the contracts contain a provision for continuous service of water for the entire acreage for which water was contracted irrespective of whether water is or is not actually used on the lands covered by the contracts. In other words, they are required by their contracts to pay a certain amount per acre per year even though part of the acreage may remain uncultivated, and no water used. Under these contracts, on the one hand the company must hold itself in readiness to serve the entire acreage covered by the contracts, and hence is not free to dispose of, to any one else, the water necessary to do this, and on the other hand the consumers are required to pay for the full acreage involved irrespective of whether the entire acreage be irrigated each year.

In this connection, it is urged that in the Decision of the Commission No. 5227, 15 O. & O., R. R. C. 425-450, the provision requiring payment for acreage on which water was not actually used was set aside. However, we think a reading of the entire opinion in that case will not bear out this contention. The order itself provided for three distinct classes of rates:

[fol. 21] 1. A flat rate for consumers not holding contracts.

2. A measured rate to apply where meters were installed.

3. A flat rate for holders of contracts.

The order clearly shows that the contract holders were treated as a separate class of consumers and the Commission deemed that, except as to the change in rates, the contracts remained in full force and effect.

If the entire system were metered, as has been recommended by the Commission, and all water was paid for on a measured basis, a situation might be presented which would justify the elimination of the annual acreage charge on unirrigated lands. Under present conditions, however, we believe that this charge is justified, and the Com-

mission will not, therefore, prescribe a rate which will supersede this provision of the contract.

Proceeding to a consideration on the merits of the application for increased rates, a brief review and analysis of facts will be made to determine whether the present rates are unreasonable, and if so, what increase should be authorized.

Applicant operates a canal system for the irrigation of a large acreage in Butte and Sutter counties. With present facilities, service can be given to approximately 75,000 acres. Water is obtained primarily by diversion from Feather River, but this is supplemented by pumped water from a pumping plant located on the same stream. Including both main canal and laterals, there are at present 227.40 miles of canals in operation. The system is growing, however, and extensions are being made from time to time for the purpose of extending service to additional acreage. There are approximately 80,000 acres of irrigable land not under the present canal system but to which water, in so far as the available supply permits, may be furnished by the company in the future through further extensions of the system. Further discussion of properties included in the canal system and of the rate base to be employed in this proceeding will be deferred until the subjects of operating costs and revenues have been reviewed.

[fol. 22] Maintenance and Operation Expenses

The maintenance and operation expenses of the past four years, exclusive of depreciation allowance, are shown by the following Table I. This data has been compiled from the annual reports of this utility to the Commission, with the exception of that for 1921, which shows 10 months actual and 2 months estimated expenses.

Table I

Items	1918	1919	1920	1921
Pumping Expenses	$10,261.08	$7,894.03	$25,296.65	$22,332.00
Distribution Expenses	59,549.95	41,763.96	69,728.69	58,926.00
Commercial Expenses	1,104.72	1,440.96	2,576.70	3,835.00
General Expenses	20,920.96	24,056.50	54,137.53	55,155.00
Taxes	8,118.78	11,014.29	14,893.25	14,000.00
Fund for Extraordinary Repairs	.....	3,000.00	3,000.00	3,000.00
Total operating expenses.	$99,955.49	$89,169.74	$169,632.91	$157,248.00

It is noted that the operating expenses for the years 1920 and 1921 increased greatly over previous years. This fact is accounted for mainly by increased operating costs for pumping and distribution incident to the completion of the Sutter County extension, to which reference will be made later, together with the extraordinary expense incurred by reason of 1920 water shortage and those for settlement of damage claims for canal seepage.

For the purpose of determining what, if any reduction may be anticipated in operating expenses for the ensuing year and thereafter, a further segregation and comparison has been made of certain extraordinary expenses incurred during the year 1919 and 1920. This is set forth in the following table, which is compiled from details included in the items set forth in Table I above:

[fol. 23] Table II

Items	1919	1920	1921
Fund—Extraordinary Repairs, Flood Damage	$3,000	$3,000	$3,000
Damage claims due to canal seepage, etc.	6,698	28,499	16,999
Legal expense	3,171	5,255	11,287
Railroad Commission expense	342	2,562	1,688
1920 water shortage expenses	....	22,900	....
Extraordinary clearing and repairing canals	....	19,000	....
Totals	$13,211	$81,216	$42,974

It is interesting to note the comparison between the totals for extraordinary expenses as shown by the foregoing table for the years 1919, 1920 and 1921, with the totals of all operating expenses incurred by the company over the same years as set forth in Table I above:

Table III

	1919	1920	1921
Totals all Operating Expenses (Table I)	$89,169.74	$169,632.91	$157,248.00
Totals of Extraordinary Expense (Table II)	13,211.00	81,216.00	42,974.00
Difference	$75,959.74	$88,417.91	$114,274.00

It is apparent that a very large part of the operating expenses in the past two years have been due to expenses incurred outside of the normal costs of operation of an irrigation system such as that under consideration. Undoubtedly, some extraordinary repairs to canals and other items of unforeseen expense must be anticipated. An example of this kind is the item of $3,000 per annum set forth in the above tables as a fund for extraordinary repairs. This amount was allowed by the Commission's Decision No. 5227, to create a fund to [fol. 24] cover damages to the system from periodical flooding of the river. The evidence shows, however, that since the establishment of this fund in 1919, only $3,134 has actually been charged against it. All of the foregoing facts and circumstances have been taken into consideration in the Commission's determination of estimated operating costs for the ensuing year.

An estimate of the maintenance and operation expenses for 1922 was submitted by applicant in considerable detail. Protestants questioned the reasonableness of the total estimate thus submitted, dwelling particularly on the amounts for various extraordinary expenses which they contend should not, under normal conditions, recur annually to that extent and also on the large operating force and payroll as set out. Mr. R. W. Hawley, a consulting hydraulic engineer, appearing for the protestants, included in his report submitted in evidence an estimate of the cost of operation for 1922, which he deems a proper normal expenditure at the prices to be anticipated.

Following is a comparative tabulation summarizing said estimated maintenance and operation expenses for 1922:

[fol. 25]

Table IV

Item	Applicant's estimate for 1922	R.W. Hawley's estimate for 1922	Reduction by R. W. Hawley
Pumping Expense: Labor, Materials and Power....	$20,713	$25,000	.....
Distribution Expense: Labor Materials and repairs to dam	60,128	33,640	$26,488
General Office Expense and Commercial	24,140	13,880	10,260
Miscellaneous Expense:			
Taxes	14,500	15,000	.....
Insurance	3,000	2,500	500
Legal Expense	7,120	2,500	4,620
Railroad Commission Expense	2,182	1,000	1,182
Extraordinary Repairs (Flood Damage) ...	7,500	5,000	2,500
Damages—from Canal seepage	12,000	5,000	7,000
Clearing sand, silt, etc., from canals	5,000	.....	5,000
Water shortage	7,000	.....	7,000
Totals	$163,283	$103,520	(Net) $59,760

[fol. 26] An analysis of the details of above items shows that Mr. Hawley's reductions from applicant's estimates include approximately $18,000 on the items of wages and salaries and $21,500 on the items set out by applicant as costs due to water shortage, damage claims, and the wholesale clearing of canals by steam shovel.

Applicant based the above estimates for the future largely upon operating conditions obtaining and expenditures actually incurred in 1921. However, the amounts as set out for certain extraordinary expenses were based on applicant's opinion as to their probable re-

currence annually or periodically, from a consideration of the expenditures of this character encountered the past few years.

As evidenced in the record, this utility has, during the past few years, passed through a period of unusual activity in construction and repairs and renewals of its system when prices of labor and materials were abnormally high. This fact, together with the recent abnormal water shortage and other extraordinary expenses above pointed out, have contributed largely to the increase in operating expenses. The company is now emerging from this period and, taking into consideration the apparent downward trend of labor and material costs, together with possible economies in operation and elimination or reduction of certain extraordinary expenses which the recently reorganized management may effect, it is reasonable to expect in the future a material reduction in total operation expenses over those for 1921, as set out above. However, it appears that such an immediate and drastic reduction as that indicated by Mr. Hawley's estimate above could only be put into effect at the expense of probable deferred maintenance and unsatisfactory service to consumers. Such economies at this time would undoubtedly have to be offset by future increases in expenditures.

[fol. 27] The expense of a periodical wholesale clearing of canals by steam shovel will no doubt be largely offset by a reduction in the labor cost of normal annual maintenance of canals, and the Sunset pump plant installed on the Feather River in 1921 will enable a regulation of the flow of water according to demand in the different canal systems, and should thereby effect a reduction in the water shortage expense as heretofore experienced. Although no damaging floods have occurred in the Feather River since 1918, past experience shows that they may be expected periodically. This Commission's Decision No. 5227 (supra) allowed $3,000 annually to cover damages to the system from this source. Furthermore, the extensive system of drainage ditches installed by the reclamation districts in this region and now nearing completion should afford certain relief to this system from such damages.

Future legal expenses and allowance for damage claims resulting from seepage and breaks in canal banks are clearly matters which cannot be accurately determined. The Commission has allowed a reasonable sum for these items.

After due consideration of all the circumstances and particularly the more important factors set out above, it is concluded that $133,000 is a reasonable sum to include in the annual charges for future maintenance and operation. Allowance has been made therein for an annual sum to meet the reasonable recurrence of such extraordinary or abnormal expenses as must be expected in the operation of this system, and also for the amortization of the 1916 Railroad Commission expense as allowed in this Commission's Decision No. 5227.

Depreciation

Applicant's estimate for a depreciation allowance is $24,183 com- [fol. 28] puted on the 6% sinking fund basis, with an additional

$5,000 for obsolescence. Mr. Hawley arrives at a total of $16,023 for this item, including $5,000 for obsolescence, using the same basis and assuming that canal earth work is undepreciable.

The Commission's engineer submits a total of $18,650 also computed on the sinking fund basis.

Analyzing the detailed computations and assumptions made by the Commission's engineer, and comparing with known experience, it appears that his total reasonably approximates the proper annuity to provide a fund for replacement on the system as parts become worn out or are replaced by obsolescence.

The sum $19,000 will be included in the annual charges for a depreciation annuity.

Revenues

Following is a comparison of the operating revenues of the past four years and the respective acreage irrigated to rice and other crops, as compiled from the record.

[fol. 29]

Item	1918		1919		1920		1921	
	Acres	Revenue	Acres	Revenue	Acres	Revenue	Acres	Revenue
Rice irrigated.....	21,000	127,383	21,000	136,272	27,000	179,004	28,750	192,077
Other crops irrigated.	19,908	40,117	21,934	44,228	24,979	50,156	21,957	42,123
Land charged but not irrigated	2,000	4,000	3,000	6,000	2,700	5,400	5,900	11,800
Totals	42,908	171,500	45,934	186,500	54,679	234,560	56,607	248,000

The above table shows that the irrigation of rice has constituted the main source of income of this utility, and that approximately 55 per cent of the total acreage irrigated in 1921 was for rice. Experience in this area shows that land is usually planted to rice for three consecutive years, when it is necessary to rest this land or rotate the crops for one or more years in order to eradicate water [fol. 30] grass and other weeds. Thus, the income of the company is materially affected and this factor must be given consideration in estimates of future revenue from rice irrigation.

Other factors have a material bearing upon the estimated future revenues of applicant. The completion of the Sutter County extension canals brought in an additional rice acreage of 4,320 acres in 1920, and 12,993 acres in 1921. A comparison of 1919 total rice acreage with that of succeeding years shows that by reason of old rice acreage being rested, the additional acreage on the Sutter County extension only increased the total for 1920 by 2,680 acres, while that of 1921 shows a decrease of 5,243 acres. All of the acreage served by the extension is under contract to use water for rice irrigation for a period of three years. It is probable that this land will ultimately be planted to trees and other crops to which the soil is more adaptable than rice culture. This will materially lessen the use of water and diminish the revenues of applicant.

In view of all the circumstances, it is reasonable to conclude that the acreage irrigated and the revenues received in 1921 be made the basis for computation of rates for the immediate future. We, therefore, adopt as an estimated revenue the sum of $248,000, if present rates continue in effect.

Rate Base

A complete valuation of the properties of applicant was made by the Commission in a prior proceeding, Application No. 2963, Decision No. 5227, as a result of which the sum of $871,764 was fixed as the rate base on January 1, 1918. Subsequent thereto certain extensions and additions have been made and some portions of the property included in the prior valuation have been retired and [fol. 31] abandoned. In bringing the valuation down to date, appraisals of the physical properties of applicant, which were used and useful, as of October 31, 1921, were submitted by applicant and by H. A. Noble, one of the Commission's hydraulic engineers.

The following is a comparative summary of the appraisals as submitted:

Item	By Commission's engineers	By applicant
Rate base as of Jan. 1, 1918 as fixed by Commission's Decision No. 5227 (supra)	$871,764.00	$871,764.00
Deduct retirements and abandonments	31,176.62	16,642.00
Used and useful property remaining	$840,587.38	$855,122.00
Additions and betterments subsequent to Jan. 1, 1918	1,073,699.20	1,073,699.30
Interest during construction (1918 to 1921)	.....	64,421.96
Totals as of October 31, 1921	$1,914,286.58	$1,993,243.26

The appraisal made by the Commission's engineers is included in a report which was filed in evidence (Commission's Exhibit No. 1), which report was compiled from data obtained from a field investigation and examination of the records of the utility. In so far as the figures are based upon accounts and records of the company, a careful check has been made by the Commission and the accuracy of the figure sufficiently established.

Included in the item of additions and betterments subsequent to January 1, 1918, is the cost of constructing the Sutter County extension which requires more detailed analysis. The negotiations for this extension began in 1918. At that time, as a result of unusually large profits made from rice growing, there was a great desire on the [fol. 32] part of certain farmers in Sutter County to have an extension built which would irrigate for rice culture about 14,400 additional acreage. The proposed extension involved immediate construction work and expenditures beyond any normal or reasonable development of the system within so short a period. This is apparent from the fact that out of a total of 227.40 miles of canal system, 72.36 miles represent the Sutter County extension. However, after some negotiations between the company and the prospective consumers, an agreement was reached and contracts entered into, whereby the immediate construction of the extension was undertaken by the company, the farmers agreeing to use a certain amount of water for irrigation of rice for three years and to advance to the company the total cost of the construction, such sums advanced to be thereafter refunded in annual installments, in accordance with the rules and regulations of the company. Due to many unforeseen circumstances, the cost of the extension far exceeded the first estimates, and after the work had been partially completed supplemental contracts were entered into, modifying those originally executed between the company and the consumers and providing for an outright donation by the land owners to the company of $20.00 per acre for the

gross acreage to be served. The amount thus donated aggregated $286,000. The work was rushed as much as possible notwithstanding higher costs incidental to abnormal war conditions and lack of preparation and organization of the company's forces for so large an undertaking. As a result of this and other circumstances, the total cost to the company, including interest during construction, was $816,200. This approximates $56.00 per acre for the gross acreage served.

In our opinion, the cost of the Sutter County extension was considerably more than normal, by reason of the urgent character of the [fol. 33] work to meet the pressing demands for rice irrigation. We do not believe that this cost is a correct measure of the value of the property constructed in so far as rate fixing is concerned. As above noted, however, the consumers donated the sum of $286,000.00 for the purpose of securing the immediate completion of the extension. For the purposes of this decision, therefore, we will not include in the allowance of value for the Sutter County extension the amount donated by the consumers. A further deduction from the total cost of the extension is proper on account of expenditures for certain portions of the work which, by reason of improper construction or change of plans, were subsequently abandoned and are, therefore, not now useful in the operation of the system. Included in this deduction is $10,400.00 expended for excavation and structures on Live Oak Channel, and $4,200 for an uncompleted ditch in Sutter County, and an allowance of $1,500.00 on the estimated cost of substituting temporary wooden bridges for certain concrete siphons, constructed under highways and later found to be inadequate. In view of the above deductions, we will adopt, as a reasonable allowance of value for the Sutter County extension, the sum of $464,624, to which will be added the sum of $27,877, for interest, during construction, on funds provided by the company for this work, making a total allowance for this extension of $492,501.00.

It may be noted that the sum allowed for the Sutter County extension includes $115,120.00 for the Sunset pumping plant on the Feather River, which is directly chargeable to this work, and approximately $86,000.00 indirectly chargeable to the project by reason of necessary enlargement of the main canal.

The sum of $31,176.62, shown in Mr. Noble's appraisal under the item of retirements and abandonments, is adopted as the correct figure instead of that shown by applicant, which omitted certain abandonments.

[fol. 34] Summarizing the valuations and necessary allowances, we obtain a rate base as shown by the following table:

Table V

Value of system as shown by rate base of January 1, 1918 (Decision 5227)	$871,764.00	
Deductions for retirements and abandonments	31,176.62	
		$840,587.38
Additions and betterments subsequent to January 1, 1918	$768,322.30	
Interest during construction (1918 to 1921)	46,099.33	
		814,421.63
Total to be used as rate base		$1,655,009.01

The rates at present in effect produce an annual gross income of $248,000. Deducting from this the necessary allowances for maintenance and operation, taxes and sinking fund annuity, there remains as net revenue available for fair return on the property $96,000. This sum amounts to 5.8% on the rate base above shown. While it is true that this utility is still in process of development, we believe the company is reasonably entitled to a greater rate of return than that which it now receives. An increase in the rates will, therefore, be allowed in an amount sufficient, in our judgment, to enable the applicant under continuing conditions of development, the return to which it is entitled.

Experience of all extensive irrigation projects in this state has shown that there is a period of development during which the revenues from water sales are insufficient in many cases to meet even maintenance and operation expenses. In the case of the Sutter-Butte Canal Company the development has been exceptionally rapid, due to the introduction of rice culture, and with the normal increase in acreage irrigated, it is apparently approaching the time when, under reasonable rates charged to its consumers, it will obtain a revenue to yield an adequate and full return on its investment.

[fol. 35] It will be noted that the general form of the rate schedule herein established is the same as that at present in effect, providing for three classes of rates, namely:

1. Flat rates for consumers not holding contracts.

2. Measured rates to apply where meters are installed.

3. Flat and measured rates for certain contract holders.

The advantage and advisability of a measured system of delivery is clearly set out in Decision No. 5226 of this Commission, wherein the rates at present in effect were established. However, it was not deemed advisable, under present conditions and with the present development of the system, to alter, in this proceeding, the form of the rate schedule or its application to contract holders, with one exception: The consumers on the Sutter County extension, who are obligated under special contract to use water for rice irrigation for

the period of three years, will be charged on the non-contract schedule. This appears fair and equitable, since these contracts were entered into in good faith for the primary purpose of securing immediate service of water, in consideration of which large donations of money were made by the farmers, and the company agreed to supply the water at the rate stated.

Some 60 consumers of the company are served through their mutually owned and operated system of ditches, known as Gridley Colony Ditch No. 1, and its laterals. This system was formerly a part of that operated by Gridley Land and Irrigation Company, all the remaining ditches of that company having been acquired by Sutter-Butte Canal Company about 1918. All of these consumers are owners of contracts which have entitled them to the preferential initial payment rate. They have, therefore, in a measure been compensated for the additional cost of water to them due to maintenance, at their own expense, of their privately owned ditches. It is not deemed advisable in this proceeding to set out for these consumers a reduced rate other than that provided in schedule No. 3 [fol. 36] in the accompanying order. The advisability of the Sutter-Butte Canal Company acquiring and operating this privately owned portion of the ditch system is apparent, and it is recommended that the company and these consumers endeavor, by negotiations, to reach equitable terms for a transfer of the ownership of these ditches.

I herewith submit the following form of order:

Order

The Sutter-Butte Canal Company having made application to this Commission as above entitled, public hearings having been held, briefs having been filed subsequent to the hearings and the Commission being fully apprised in the premises:

It is hereby found as a fact, that the present schedule of rates of the Sutter-Butte Canal Company in so far as it differs from the schedule herein established, is unjust and unreasonable, and that the schedule of rates herein established constitute just and reasonable rates to be charged by said company for water;

And basing its order upon the foregoing findings of fact and the other statements of fact contained in the opinion preceding this order,

It is hereby ordered by the Railroad Commission of the State of California that Sutter-Butte Canal Company be, and it is hereby, authorized and directed to file with the Railroad Commission within five (5) days from the effective date of this order the following schedules of rates for irrigation water, said schedules of rates to be effective for service rendered for the 1922 irrigation season and thereafter;

[fol. 37] Schedule No. 1—Flat Rates

Rice Irrigation

First year:

$1.00 per acre to accompany application.

$3.40 per acre, payable on or before February 1st, plus 70 cents per acre if water is pumped.

$3.40 per acre, payable on or before July 1st, plus 70 cents per acre if water is pumped.

Subsequent years during continuance of service:

$1.40 per acre, payable on or before February 1st of each year, plus 70 cents per acre if water is pumped.

$3.40 per acre, payable on or before July 1st of each year, plus 70 cents per acre if water is pumped.

Grain (Other than Rice) Irrigation

60 cents per acre to accompany application, plus pumping charge at rate of 25 cents per acre foot if water is pumped.

60 cents per acre for second and each subsequent irrigation during continuance of service, payable before each irrigation, plus last mentioned pumping charge if water is pumped.

All Other Crops

First year:

50 cents per acre to accompany application.

$1.15 per acre, payable on or before February 1st, plus 35 cents per acre if water is pumped.

$1.15 per acre, payable on or before July 1st, plus 35 cents per acre if water is pumped.

Subsequent years during continuance of service:

$1.65 per acre, payable on or before February 1st, of each year, plus 35 cents per acre if water is pumped.

$1.15 per acre, payable on or before July 1st of each year, plus 35 cents per acre if water is pumped.

[fol. 38] For Summer Plowing or for Sprouting Water Grass, Weeds, etc., in Order to Eradicate Same and Not for Purpose of Raising Crops in Same Season or Year

$1.15 per acre (first flooding) to accompany application, plus pumping charge at rate of 25 cents per acre foot if water is pumped.

60 cents per acre for second and each subsequent flooding in the same year for same purpose, payable before each flooding, plus last mentioned pumping charge if water is pumped.

Schedule No. II—Measured Rates

Rice Irrigation

First year:

$1.00 per acre to accompany application.

$3.15 per acre for 3 acre feet or less per acre, payable on or before February 1st, plus pumping charge at rate of 25 cents per acre foot if water is pumped.

For water used in excess of 3 acre feet per acre additional payment to be made therefor at rate of $1.30 per acre foot, plus pumping charge at rate of 25 cents per acre foot if water is pumped; same to be paid at end of month of use.

Subsequent years during continuance of service:

$4.15 per acre for 3 acre feet or less per acre, payable on or before February 1st of each year, plus pumping charge at rate of 25 cents per acre foot if water is pumped.

For water used in excess of 3 acre feet per acre, additional payment to be made therefor at rate of $1.30 per acre foot, plus pumping charge at rate of 25 cents per acre foot if water is pumped, same to be paid at end of month of use.

[fol. 39] Grain (Other than Rice) Irrigation

90 cents per acre for ½ acre foot or less per acre to accompany application, plus pumping charge at rate of 25 cents per acre foot if water is pumped.

After first year and during continuance of service above minimum rate, plus last mentioned pumping charge if water is pumped, is payable on or before February 1st of each year.

For water used in excess of ½ acre foot per acre, additional payment to be made therefor at rate of $1.30 per acre foot, plus pumping charge at rate of 25 cents per acre foot if water is pumped; same to be paid at end of month of use.

All Other Crops

First year:

50 cents per acre to accompany application.

$1.80 per acre for 1½ acre feet or less per acre payable on or before February 1st, plus pumping charge at rate of 25 cents per acre foot if water is pumped.

For water used in excess of 1½ acre feet per acre additional payment to be made therefor at the rate of $1.30 per acre foot, plus pumping charge at rate of 25 cents per acre foot if water is pumped; same to be paid at end of month of use.

Subsequent years during continuance of service:

$2.30 per acre for 1½ acre feet or less per acre, payable on or before February 1st of each year, plus pumping charge at rate of 25 cents per acre foot if water is pumped.

For water used in excess of 1½ acre feet per acre, additional payment to be made therefor at rate of $1.30 per acre foot, plus pumping charge at rate of 25 cents per acre foot if water is pumped; same to be paid at end of month of use.

For Summer Plowing or for Sprouting Water Grass, Weeds, etc., in Order to Eradicate Same and Not for Purpose of Raising Crops in Same Season or Year

90 cents per acre for ½ acre foot or less per acre to accompany application, plus pumping charge at rate of 25 cents per acre foot if water is pumped.

[fol. 40] For water used in excess of ½ acre foot per acre, additional payment to be made therefor at rate of $1.30 per acre foot, plus pumping charge at rate of 25 cents per acre foot if water is pumped; same to be paid at end of month of use.

Schedule No. III—Initial Payment Rates

$10.00 per acre to accompany application, unless otherwise provided by agreement.

Rice Irrigation—Flat Rates

$2.90 per acre payable on or before February 1st of each year during continuance of service, plus 70 cents per acre if water is pumped.

$2.90 per acre payable on or before July 1st of each year during continuance of service, plus 70 cents per acre if water is pumped.

Rice Irrigation—Measured Rates

$3.20 per acre for 3 acre feet or less per acre, payable on or before February 1st of each year during continuance of service, plus pumping charge at rate of 25 cents per acre foot if water is pumped.

For water used in excess of 3 acre feet per acre, additional payment to be made therefor at rate of $1.30 per acre foot, plus pumping charge at rate of 25 cents per acre foot if water is pumped; same to be paid at end of month of use.

All Other Crops—Flat Rates

$1.15 per acre payable on or before February 1st of each year during continuance of service, plus 30 cents per acre if water is pumped.

$1.15 per acre payable on or before July 1st of each year during continuance of service plus 30 cents per acre if water is pumped.

All Other Crops—Measured Rates

$1.90 per acre for 1½ acre feet or less per acre, payable on or before February 1st of each year during continuance of service, plus pumping charge at rate of 25 cents per acre foot if water is pumped. [fol. 41] For water used in excess of 1½ acre feet per acre, additional payment to be made therefor at the rate of $1.30 per acre foot, plus pumping charge at rate of 25 cents per acre foot if water is pumped, same to be paid at end of month of use.

The effective date of this order is hereby fixed and designated as the 10th day of May, 1922.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 26th day of April, 1922.

H. W. Brundige, Irving Martin, Chester H. Rowell, H. S. Benedict, Commissioners.

Certified as a true copy. (Signed) Chas. A. Beck, Asst. Secretary Railroad Commission of the State of California.

[fol. 42] EXHIBIT "B" TO PETITION

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Application No. 7317

[Title omitted]

Petition for Rehearing of Live Oak Water Users Association, Butte County Farm Bureau, Sutter County Farm Bureau, California Farm Bureau Federation, and C. W. Thresher, W. G. Coppernoll and L. B. Wallace and Others Similarly Situated; Also Butte County Water Users Association and A. J. Lofgren and Other Consumers Similarly Situated.

To the Honorable the Railroad Commission:

The above named petitioners hereby apply for rehearing in the above entitled proceeding, under the provisions of Section 66 of the Public Utilities Act of the State of California, and each of the petitioners hereby specifically sets forth the grounds upon which they consider the decision and order of this honorable Commission, made on the 26th day of April, 1922, and designated as Decision No. 10372 in the above entitled matter, to be unlawful, as follows:

1. In the opinion of the petitioners the determination in said Decision, incorporated in the following statement, that

"Another group of consumers holding contracts similar to those just referred to take a totally different position, and urge that as to

them applicant is a public utility and the former action of the Commission, fixing rates different from those specified in their contracts, has resulted in the complete abrogation of these contracts in all particulars."

is contrary to the only evidence in the case upon the subject, and, therefore, the said finding of fact is beyond the jurisdiction of this honorable Commission.

[fol. 43] 2. In the opinion of these petitioners the statement contained in said Decision, that

"Under these contracts, on the one hand the company must hold itself in readiness to serve the entire acreage covered by the contracts, and hence is not free to dispose of, to anyone else, the water necessary to do this, and on the other hand the consumers are required to pay for the full acreage involved, irrespective of whether the entire acreage be irrigated in each year,"

is unlawful in two particulars, in this, that

(a) The first portion of said statement, to the effect that the Company must hold itself in readiness to serve the entire acreage covered by the contracts, is in conflict with the provisions of Section 1 of Article XIV of the Constitution of the State of California; and

(b) The portion of said statement to the effect that the consumers are required to pay for water for the entire acreage, irrespective of whether the same be irrigated or not, coupled with schedules fixed by said decision, constitutes an attempted determination beyond the power of this honorable Commission of a matter justiciable only in a court of law, and, it is beyond the power of this honorable Commission to fix rates to be charged against any person for any utility service in excess of the utility service rendered by the public utility; to that extent the said decision is violative of the provisions of Section 13 of Article I of the Constitution of California, and of Section I of Article 10, and of the Fourteenth Amendment to the Constitution of the United States.

3. In the opinion of the petitioners, the said Decision is unlawful in this, that it is stated in said Decision that the former decision [fol. 44] of this honorable Commission, numbered 5227, shows that the contract holders were treated as a separate class of consumers, and the Commission deemed that, except as to the change in rates, the contracts remained in full force and effect, and said Decision No. 5227, according to the uncontradicted evidence in this case, was not so construed nor applied by the respondent water company, but has been and is being applied as though this honorable Commission had fixed rates for water used, and in addition thereto had fixed rates for water not used by the consumers, and this fact was laid before this honorable Commission. The consumers of the respondent water company were threatened by the respondent, pending the decision in this case, with refusal to serve them, or any of them, any

water unless they agreed to pay to the company for water not used or to be used for irrigation this year, at the rates fixed by the Commission per acre, largely in excess of the rates fixed by the pre-existing contracts, and thus have been coerced in order to protect their rights under the law to pay in to the Commission, pending final determination in this case a large sum of money, aggregating four thousand eight hundred and fifty-five dollars ($4,855.00) by one hundred and ninety-five (195) different consumers; and, your petitioners fear that, unless rehearing is granted in this case and the rights and obligations of the consumers in regard to the pre-existing contracts, and in regard to the lack of power on the part of this honorable Commission to fix rates for utility service not actually rendered, will result in a loss to them of that portion of the sums of money so deposited in excess of the rates properly chargeable, unless this honorable Commission shall by its order on rehearing direct the respondent water company, to serve the consumers under proper [fol. 45] schedules of rates, within the power of the Commission to make for water actually used by them, and shall by such order apportion to the respondent water company the portions of said sums deposited, respectively, payable for water actually used and applied for, and to the depositors the excess thereof, leaving it to the parties to said contracts to adjust their differences in the ordinary forms of law.

Facts

Each of the petitioning individual consumers, by himself or his predecessors in interest, was and is the owner and holder of a contract for the service of water by the respondent water company, the consideration whereof was mutual and non-severable, and was that upon a rate per acre fixed by the contract upon all the land owned by each such contract holder, the respondent water company should supply to such contract holder such amount of water not exceeding a certain quantity per acre for his entire holding each year as might be required by the contract holder for irrigation of so much of his said land as he might in any one year desire to irrigate, the rate per acre being fixed in every contract at a sum per acre less than the rates fixed by the Railroad Commission.

Under the provisions of Section 1 of Article XIV of the Constitution of California, the State retained sovereign power to determine at any time the rates or compensation to be collected by any corporation "for the use of water supplied," and to this extent, and this extent only, were such contracts subject to change within the powers of this honorable Commission.

In and by Decision No. 5227 of this honorable Commission (15 [fol. 46] C. R. C. 425), according to the statements contained in Decision No. 10372, the Commission fixed rates for water used in excess of the rates agreed upon by the parties under said contracts, and did not set aside the provisions in said contracts, requiring payment for acreage on which water was not actually used, and said Decision No. 5227 has been construed and applied by this honorable Commission, and by said respondent water company, as requiring

said holders of said contracts to pay per acre of land not irrigated the increased rate per acre fixed by the Commission for water actually used for irrigation.

By Schedule Number 3, incorporated in said Decision No. 10372, the Commission, in the exercise of its powers, fixed rates for water used, in excess of the former contract rates, and in so doing it set aside the sole consideration resting upon the lower rate upon which the individual holders of said contracts agreed to pay a rate per acre upon all their lands.

Argument

It is not true, as stated in said Decision, that these petitioners contend, or ever have contended, that Decision No. 5227, fixing rates different from those specified in their contracts, resulted in the complete abrogation of the contracts in all particulars. In the brief filed on behalf of petitioners before Decision No. 10372 was rendered, it was said:

"None of these contracts when made was in violation of any existing law or regulation. The contracts were, and still are, entirely valid. In each contract for a consideration paid by the land owner or the land buyer he received either his right to water in addition to the land he owned or his right to water with the land he was buying, and, when the consideration was paid by him and the conveyance made to him, that portion of the valid contract became fully executed. The land owner or water right purchaser could not by reason of any action on the part of the State recover the consideration passed from him, nor could the company by reason of any such action rescind the contract or deed."

[fol. 47] When the State undertook to regulate the sale of the water publicly dedicated under the provisions of Section 1 of Article XIV of the Constitution of California, all provisions of the contracts concerning the rates to be charged and the service to be rendered were within the control of this honorable Commission as to water actually used, or to be used, and the existing contracts remained in full force and effect, except as the consideration therefor moving from or to either party was changed by the lawful exercise of the powers vested in the Railroad Commission.

Neither the Commission nor any other tribunal has power to make an entirely new contract or to fix a new consideration for an existing contract to which the parties themselves have not agreed.

Const. U. S., Art. I, Sect. 10;
Gray vs. Tubbs, 43 Cal. 359;
Magee vs. McManus, 70 Cal. 553.

In Schedule 3, and according to the statement contained in Decision No. 10372, the Commission has attempted to treat the holders of these contracts as constituting a separate class, and the Commission in fixing Schedule 3 has imposed upon those in that separate class rates which are as to them discriminatory, unfair and unjust, as compared with rates of other classes. The Commission states, in effect,

in its decision that it has no power to change said contracts, except in the matter of rates, and it further says that if the entire system were metered as has been recommended by the Commission, "a situation might be presented which would justify the elimination of the annual acre charge on unirrigated lands."

It is said in said Decision that because of said contracts the [fol. 48] respondent water company is not free to dispose of .o any one else the water necessary to serve the entire acreage covered by the contracts. In this statement this honorable Commission has apparently overlooked the rule laid down by the Supreme Court that

"A public service water company which is appropriating water under the Constitution of 1879, for the purpose of rental, distribution and sale, cannot confer upon a consumer any preferential right to use any part of its water."

Leavitt vs. Lassen Irrigation Co., 157 Cal. 82;
Butte County Water Users Assn. vs. Sutter-Butte Canal Co., 61 Cal. Dec. 316.

This matter was argued at length in the brief on behalf of the Live Oak Water Users Asociation, the California Farm Bureau Federation and certain other consumers on pages 2 to 9 inclusive.

Without disrespect for the Commission, upon a careful reading of Decision No. 10372, your petitioners are led irrepressibly to the conclusion that the Commission has not given complete consideration to the serious nature of the presentation made in that brief, and for this reason, as well as for each of the reasons, and on each of the grounds herein set forth, your petitioners respectfully pray for an order granting rehearing in this matter, to the end that such additional information in regard to the facts, and in regard to the law, may be submitted for the consideration of the Commission as it may desire or be willing to hear.

Respectfully submitted, (Signed) F. S. Brittain, T. C. Nelson, George F. Jones, Attorneys for Petitioners.

[fol. 49] EXHIBIT "C" TO PETITION

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

Application No. 7317

[Title omitted]

Order Denying Applications for Rehearing

By the COMMISSION:

R. A. Room and Ida H. Room, J. P. Hopkins and Hazel S. Hopkins and W. E. Gibson, parties to the above-entitled proceedings,

having on the 8th day of May, 1922, filed an application for a re-hearing in said proceedings; and Live Oak Water Users Association, Butte County Farm Bureau, Sutter County Farm Bureau, California Farm Bureau Federation, and C. W. Thresher, W. C. Coppernoll, and L. E. Wallace, and others similarly situated; also Butte County Water Users Association and A. J. Lofgren and other consumers similarly situated, parties to the above-entitled proceedings, having on the 9th day of May, 1922, filed application for re-hearing in said proceedings;

The Commission having given full and careful consideration to said applications, and it appearing to the Commission that the matters referred to therein have been fully presented and considered in prior [fol. 50] hearings in said proceeding, and the Commission being of the opinion that no good cause appeared why a re-hearing should be granted;

It is hereby ordered that the applications of the above-entitled parties and each thereof, for re-hearing be, and the same are hereby denied.

Dated at San Francisco, California, this 22nd day of May, 1922.

H. W. Brundige, Irving Martin, Chester H. Rowell, Commissioners.

Certified as a true copy. (Signed) H. G. Mathewson, Secretary Railroad Commission State of California.

[fol. 51] EXHIBIT "D" TO PETITION

Application

To Sutter Butte Canal Co.:

The undersigned applicant— hereby request— you to furnish water for the irrigation of the following described land in —— County, State of California, to-wit: ——, containing — acres.

The applicant— desire— to use the water for the irrigation of said land as follows (State kind of crop):

— acres of —.
— acres of —.
— acres of —.
— acres of —.

The applicant— agree— to pay for said water in accordance with your established rates for said service specified in Schedule —; payment to be made in installments at the times prescribed in your established rules and regulations on file with the Railroad Commission of the State of California.

The applicant— agree— to comply with said rules and regulations.

Dated —— —, 19—.

—— ——, Applicant.

Sutter-Butte Canal Co. accepts the foregoing application. Dated —— —, 19—.

Sutter Butte Canal Co., by —— ——.

[fol. 52] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

WRIT OF REVIEW

The People of the State of California to the Railroad Commission of the State of California, Greeting:

Whereas, it appears to us by the verified petition of Live Oak Water Users Association and the other petitioners above named, parties to the proceedings hereinafter mentioned, that each of said petitioners is a party beneficially interested therein, that in a certain proceeding entitled "In the Matter of the Application of Sutter-Butte Canal Company, a corporation, for an increase in rates, Application No. 7317" you have exceeded your jurisdiction and have not regularly pursued your authority in making and rendering your order and decision, numbered 10372, in said last mentioned proceeding, that there is no appeal provided by law from said order and decision or either of them, nor any other plain, or speedy, or adequate remedy at law, and that this is a proper case for the issuance of a Writ of Review as provided in the Public Utilities Act of the State of California.

We therefore command you that you certify and send to our Supreme Court, sitting in bank, at its courtroom in the City and County of San Francisco, on Wednesday, the 5th day of July, 1922, at 10 o'clock A. M. of said day, annexed to this writ, your record in said [fol. 53] proceeding for the purpose of having the lawfulness of your said order and decision, No. 10372, inquired into and determined, and in order that our Supreme Court may review, reverse, correct or annul your said order No. 10372, if it shall then appear that the same lawfully should be done.

Witness the Honorable Supreme Court of California, by the Honorable Lucien Shaw, Chief Justice, at San Francisco, California, this 22nd day of June, 1922.

B. Grant Taylor, Clerk of the Supreme Court, by I. M. Johnson, Deputy Clerk. (Seal of Supreme Court of California.)

[fol. 54] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

AFFIDAVIT OF T. C. NELSON—Filed June 23, 1924

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

T. C. Nelson, being duly sworn, deposes and says that he is and was on the day when he served the annexed Writ of Review a male citizen of the United States, over the age of eighteen years, and is not a party to the above entitled action; that he received the said Writ of Review in said action on the twenty-second day of June, 1922; that affiant personally served on the twenty-second day of June, 1922 the above named respondent Railroad Commission of the State of California by delivery to H. G. Mathewson personally, known to affiant to be the secretary of said respondent Railroad Commission of the State of California, a copy of the Writ of Review attached to a true copy of Petition for Writ of Review, together with Petitioners' Points and Authorities on Writ of Review in said action therein named; that affiant personally served on the twenty-second day of June, 1922 the above named respondent Sutter-Butte Canal Company, a corporation, by delivery to Gordon Hall personally, known to affiant to be the President of said respondent Sutter-Butte Canal Company, a copy of the Writ of Review attached to a true copy of Petition for Writ of Review, together with Petitioners' [fol. 55] Points and Authorities on Writ of Review in said action therein named; and that affiant personally served the above named respondents at their respective offices in the City and County of San Francisco, State of California.

T. C. Nelson.

Subscribed and sworn to before me this 23rd day of June, A. D. 1922. W. W. Healey, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[File endorsement omitted.]

[fol. 56] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

A

Record of Proceedings Before the Railroad Commission of California

STIPULATION

It is hereby stipulated by the respective parties to this case on Writ of Error to the Supreme Court of the United States that the

following Statement contains all of the proceedings before the Railroad Commission of the State of California as certified by it to the Supreme Court of the State of California under the Writ of Review issued by said Supreme Court of California to the said Railroad Commission as is pertinent to the matters presented by and upon the pending Writ of Error in the Supreme Court of the United States in this case; and, the following Statement is that to which reference is made in paragraph 4 of the Joint Præcipe and Stipulation filed with the clerk of the Supreme Court of the State of California with this statement:

STATEMENT

The Sutter-Butte Canal Company is a corporation, of the State of California, and is operating as a Public Utility in the Counties of Sutter and Butte in said State in the Service of water for irrigation. As such Public Utility it is subject to the jurisdiction of the Railroad Commission of the State of California.

On November 5, 1921 the said Sutter-Butte Canal Company regularly filed its application with said Railroad Commission, praying for increased rates for such water service. Thereupon said Railroad Commission regularly made its order directing public hearings to be held upon said application commencing on the 16th day of [fol. 57] December, 1921, and inviting all persons interested at said time to appear and present to said Commission whatever they might have to offer bearing upon said application. Due notice of said order and hearing was given.

On said 16th day of December, 1921, pursuant to said order the said Railroad Commission opened said public hearings in said matter, before Honorable Irving Martin, who was then one of the Commissioners of said Railroad Commission and as such he was vested with the powers of said Commission in the matter of hearing evidence offered on said hearing. The presiding Commissioner opened said hearing by stating the purposes thereof, and thereupon directed the official reporter of said Railroad Commission who was then present to note appearances. Thereupon counsel for the applicant and counsel for various other parties, including the Plaintiffs in Error, orally announced the fact of the respective appearances of the parties represented by them, and each and all of said appearances were duly noted and entered.

Thereafter on said 16th day of December, 1921, and on such days to which said hearing was regularly and successively continued, oral and documentary evidence was introduced for the most part giving the valuation of the Canal System of the applicant, the cost of its service to the applicant, and the applicant's income; and, evidence was also introduced on behalf of the various other parties whose appearances had been noted as aforesaid, all in accordance with the customary practice before said Railroad Commission in such cases.

Pursuant to Stipulation entered into in the open hearing, there was made a part of the record of said proceedings the entire records

of certain prior proceedings before the Railroad Commission of California in which the Sutter-Butte Canal Company was a party, and in which the relationship of the said Sutter-Butte Canal Company to its various consumers was necessarily involved, to wit, those consumers referred to throughout these proceedings as the contract consumers, or contract holding consumers, and those consumers referred to as the non-contract consumers. In said prior proceedings the [fol. 58] various forms of contracts held by contract consumers of the Sutter-Butte Canal Company were introduced in evidence and were considered by the Railroad Commission of California.

Among other prior proceedings made a part of the record in the proceeding involved in this case was one in which the said Railroad Commission of California made its decision and order on the 25th day of March, 1918, designated as Decision No. 5227 and said decision is reported in Volume 15, page 425, of the Opinions and Orders of the Railroad Commission of California. Except as herein stated, none of the other said prior proceedings relate to the matters in controversy upon the present Writ of Error before the Supreme Court of the United States. Neither C. W. Thresher nor W. G. Coppernoll was one of the thirty-five complainants in Case No. 907 referred to in said Decision No. 5227 of the Railroad Commission of California, nor were any of the other Plaintiffs in Error among said complainants.

The following is the substance of so much of said Decision No. 5227 as is pertinent to the controversy in the present case: Decision No. 5227 of the Railroad Commission of California decided on March 25, 1918, is entitled Nunn et al. vs. Sutter-Butte Canal Company, Case No. 907; Cutter vs. Sutter-Butte Canal Company; Case No. 1062; Tranter et al. vs. Sutter-Butte Canal Company et al., Case No. 1083; and In the Matter of the Application of Sutter-Butte Canal Company for an order establishing rates, rules and regulations, Application No. 2963.

The Opinion in said entitled matters was rendered by Hon. Frank R. Devlin, one of the Members of said Railroad Commission. From said Opinion the following appears:

"The above entitled proceedings involve the rates, rules, regulations and practices of the Sutter-Butte Canal Company. By consent of all parties the proceedings were combined for hearing and decision.

"Nature of Proceedings

The complaint in Case No. 907 alleges in effect (1) that com- [fol. 59] plainants, thirty-five in number, are users of water for the irrigation of their lands from the canals of the Sutter-Butte Canal Company; (2) that defendant is engaged in the business of selling water for irrigation to the residents of Sutter and Butte counties, California; (3) that the rates charged by defendant for water are unjust, unreasonable and discriminatory; (4) that defendant, as a condition precedent to the delivery of water, compels intending consumers to purchase a so-called "water right" obligating themselves thereby to pay $10.00 per acre before service is commenced and for water in

seasons when none is delivered; (5) that the rules, regulations and practices of defendant are discriminatory and unjust. Complainants ask that investigation be made, hearings had and just, reasonable and nondiscriminatory rates, rules and regulations established.

Defendant, in its answer, denies all the material allegations of complainants and alleges that its rate schedule does not produce a revenue sufficient to yield it the expenses of maintenance, operation, depreciation and a fair return on the value of its property.

Complainant in Case No. 1062 alleges in effect (1) that he is the owner of 154 acres of land in the so-called Richvale Colonies, Butte County, irrigated with water from defendant's irrigation system; (2) that in 1914, defendant refused to deliver water for irrigation to complainant except upon condition that complainant execute a so-called water right contract; (3) that a charge of $1,540.00, being $10 per acre, was demanded in payment for said water right as a condition precedent to the extension of service, which charge is extortionate and unlawful; (4) that the charge provided by said contract when no water is delivered is unjust. Complainant asks that Sutter-Butte Canal Company be ordered to make reparation by paying to complainant the sum collected together with interest thereon; that complainant shall not be required to pay the amount unpaid and that it be declared that there was no consideration whatever for the promise to pay same.

Defendant, in its answer, denies all the material allegations of the complaint, and alleges that the above-mentioned contract and charges are in accordance with the legal rate schedule on file with this commission.

The proceeding in Case No. 1083 is brought by 36 consumers of the Sutter-Butte Canal Company who receive water through the lateral ditch system of the Gridley Land and Irrigation Company, which latter company is joined as codefendant with Sutter-Butte Canal Co.

The complaint alleges in effect (1) that the Sutter-Butte Canal Co. is a public utility water company delivering water to its consumers for compensation; (2) that the Gridley Land and Irrigation Company since its organization in 1909 has been operating a lateral ditch system for the purpose of conveying water from the main canal [fol. 60] of the Sutter-Butte Canal Company to the lands of complainants; (3) that the Sutter-Butte Canal Company is obligated by its contracts and those of the California Irrigated Land Company and its successor, Irrigated Land Company of California—realty companies formed to market lands in Sutter and Butte Counties—to deliver water to the lands of complainants without additional charge for the distribution of water through this lateral ditch system; (4) that the ditches of Gridley Land and Irrigation Company are in bad condition and an adequate quantity of water for irrigation has not been delivered; (5) that the property right to the ditches of the Gridley Land and Irrigation Company rests with the complainants herein because of adverse use and certain contracts with Butte County Canal Company and California Irrigated Farms Company; (6) that this commission heretofore made an order establishing a rate for the delivery of water through the Gridley laterals which if enforced will

deprive complainants of their rights to the ditch system; and, (7) that the so-called Gridley lateral ditches are a necessary part of the Sutter-Butte Canal Company system.

Complainants ask that fair, just and nondiscriminatory rates, rules and regulations be established; that the order heretofore made establishing rates for the so-called Gridley lateral ditch system be annulled; that the Sutter-Butte Canal Company be required to take over and operate the Gridley lateral ditch system and that complainants be required to execute quit-claim deeds to the Sutter-Butte Canal Company of whatever right, title and interest they may have in these lateral ditches.

Defendants deny all the material allegations contained in the complaint.

Applicant, Sutter-Butte Canal Company, hereinafter referred to as canal company, in Application No. 2963, alleges, in effect, that its rates and charges do not produce a sufficient sum to return to it the necessary annual expenses, depreciation and interest and asks that just and remunerative rates and practices be established. (pp. 427-428).

In the opinion is then set forth a history of the properties of the Sutter-Butte Canal Company showing substantially that one Fleming in 1902 filed notice of appropriation of 100,000 miner's inches of the waters of the Feather River, the point of diversion to be in approximately the same location as the present intake of the Sutter-Butte Canal Company. Fleming failed in an attempt to get financial assistance for the construction of an irrigation system upon a showing that a market existed for the water to be diverted to the extent of 10,000 acres. He transferred his rights to one McCallum who filed further appropriations of water. In 1903 these rights were transferred to the Butte-County Canal Company, a corporation, which proceeded to interest ranchers in the use of water for irrigation. [fol. 61] The owners of between 10,000 and 15,000 acres agreed to purchase a water right and buy water.

The company proceeded with the construction of a portion of its main canal and lateral ditch system and under franchises from Butte County in 1904 and Sutter County in 1905 it proceeded with its business.

The Sutter-Butte Canal Company was incorporated in 1911 under the laws of California as a public utility water company and in January, 1911, purchased its plant from the Butte County Canal Company and has operated, extended and enlarged the system since that date.

The irrigated area increased very slowly between 1904 and 1911. In order to increase the irrigated area and to profit by the sale of real estate, the owners of the canal company organized the Sacramento Valley Farms Company, which acquired, subdivided and placed on the market a large tract of land in Sutter County. In the latter part of 1911 the Sutter-Butte Canal Company acquired all rights of the Farms Company and assumed its obligations.

In an effort further to increase business, experiments were conducted in rice growing in the territory served by the Sutter-Butte

Canal Company and since 1911 rice has been cultivated to an appreciable extent.

The large use of water per acre for rice materially increased the sales of the company. The rice industry increased very rapidly until in 1913 some 12,000 acres were irrigated from this system (pp. 428-430).

"The rice industry has more than tripled the income of this company and bids fair to make it one of the most prosperous irrigation companies in the state.

In 1917, water was sold for the irrigation of 12,800 acres of rice, 600 acres of alfalfa, 7,000 acres of beans, 3,000 acres of orchards, 6,000 acres of corn and 1,200 acres of vines, gardens and miscellaneous crops, or a total of 36,000 acres irrigated.

The so-called Gridley laterals involved in Case No. 1083 were pro- [fol. 62] jected by the California Irrigated Farms Company, a corporation, organized for the purpose of subdividing and marketing real estate" (p. 431).

In the present case no question arising under said Case No. 1083 is involved.

"The present rates of the Sutter-Butte Canal Company are those set out in the so-called water right certificates or contracts.

There are six forms of agreement outstanding. The first of these was issued by the Butte County Canal Company, the principal provisions being as follows:

(1) The canal company agrees to furnish water at the rate of one cubic foot per second for each 160 acres for the purpose of irrigating the following described land. (Then follows the description of the land.)

(2) The consumer on his part is to construct and maintain a ditch extending from the company's ditch to his land and agrees that said ditch may at the option of the first party (canal company) be taken over, enlarged and operated by it, provided such use does not interfere with the delivery of water to said lands, and grants to the canal company a right of way through these lands and right of entry thereon.

(3) That portion of the contract relating to rates follows:

"It is further understood and agreed, that the water covered by this contract shall be and become appurtenant to the land herein described, and can only be conveyed by and with a conveyance of said land; and all the covenants and conditions herein shall run with said land.

The parties of the second part, in consideration of the construction of said main canal, and ditch rights and delivery of water agree to pay annually to the party of the first part, at its office, in gold coin of the United States, on the first day of September, for each and every year hereafter, the sum of Sixty (60) Dollars (that is to say at the rate of $1.50 per acre annually), the first annual payment

hereunder to become due and payable on the first day of September in the year in which water is first delivered at said gate, and shall be paid annually thereafter; provided, the amount herein agreed to be paid annually, shall, beginning with the eleventh annual payment and thereafter be reduced to the amount of forty (40) dollars annually (that is to say at the rate of $1.00 per acre annually).

[fol. 63] "All amounts becoming due under this contract shall be promptly paid when due, but if for any cause they should remain unpaid they shall draw interest at the rate of seven per cent per annum, compounded annually, if any amount hereunder shall remain due and unpaid for a space of six months the party of the first part may thereafter at any time while said amounts remain due and unpaid, upon written notice to the owner of said lands, release itself from further obligations to deliver water under this contract.

"It is further understood and agreed, that all sums due or to become due under this contract in favor of the party of the first part shall be and become a lien upon the lands herein described, and may be foreclosed as any other lien including costs and charges and all necessary and reasonable expenses, and attorney's fees connected therewith."

No charge was made from the holders of this type of contract as a condition precedent to the extension of service. The charge of $1.50 per acre per year for the first ten years included the so-called water right charge.

Other contracts of the same form were issued which provided for a charge of $1.00 per acre per year and a payment of $5.00 or $6.00 per acre for water right or initial payment at the time of the execution of the contract.

The second principal form of contract is that used by the Sutter-Butte Canal Company. It is essentially the same as that issued by the Butte County Canal Company. The rate was changed to $2.00 per acre per year. A water right or initial charge of $10.00 per acre was generally made from the consumers under this form.

When rice irrigation became an important part of the business of the company, a supplemental contract was issued provoding for an additional charge of $3.00 per acre per year during years when water is used for the irrigation of rice or a total charge of $5.00 per acre per year for this service.

Where water is pumped from the ditch by the consumer a 50-cent reduction is made to partially compensate for the additional expense. A like reduction is made under a contract between the Sutter-Butte Canal Company and the Gridley Land and Irrigation Company. The reduction being made in consideration of the latter securing water right contracts for the Sutter-Butte Canal Company.

The more recent contracts of the Sutter-Butte Canal Company provide a rate of $5.00 for rice and $2.00 for all other crops, but are similar to the preceding in other respects.

[fol. 64] In January, 1916, the canal company filed with the commission a short-term form of contract for water for rice irrigation. This form provides for a charge of $7.00 per acre per annum. No

initial payment is required of the consumer and the period of the contract is fixed at one or more years at the option of the consumer. The cost of facilities necessary is advanced by the consumer but is considered in the nature of a loan which is returned at such time as the income from the lateral reaches a sufficient amount that the company could reasonably be required to construct the extension.

Following is a summary of the contracts outstanding:

Table I

Summary of Sutter-Butte Canal Company's Contracts Outstanding

$1.00 flat rate	7,990	Acres.
1.50 rate for 10 years—then $1.00 rate	4,293	"
2.00 flat rate	12,122	"
2.00 and $5.00 rate	18,159	"
Contracts under Gilstrap system:		
$1.50 flat rate 437 Acres		
2.00 flat rate 520 "		
1.50 and $4.50 rate 837 "		
	1,794	"
Total	44,358	"
Deduct for roads, canals, drainage ditches and lands not irrigable	3,415	"
Total irrigable area at long term contracts	40,943	"
Short term contracts, $7.00 per acre per yr.	7,440	"
Grand total	48,383	"

NOTE.—$4.50 and $5.00 rates apply only in those seasons when additional water is taken for the irrigation of rice.

The rates collected in 1917, including the short term contracts, follow:

Table II

Rates Collected by Sutter-Butte Canal Company in 1917

Rate	Area	
$1.00 per acre per year	10,631	Acres.
1.50 per acre per year	1,506	"
2.00 per acre per year	16,360	"
5.00 per acre per year (rice)	5,384	"
7.00 per acre per year (rice)	7,440	"
Total area charged	41,321	"

Of the total area charged, 36,000 acres were actually irrigated." (Pp. 432-434.)

After a recital of facts not necessary to be set forth in full the Opinion continues as follows:

[fol. 65] "I find as a fact that this company and its predecessor, Butte County Canal Company, were organized as public utilities, appropriated water for the irrigation of certain lands and that the water so appropriated is now applied to those lands; obtained franchises from Sutter and Butte counties as public utilities; have held themselves out to serve anyone within the area of service for compensation, and by advertising and otherwise have solicited business generally from everyone within this area.

The fact that this company entered into so-called water right contracts does not prevent it, even as to the lands covered by such contracts, from being a public utility subject to the jurisdiction of the Railroad Commission. Palermo Land and Water Co. vs. Railroad Commission, 173 Cal. 380; Limoneira Company et al., vs. Railroad Commission, 174 Cal. 232." (p. 437.)

After recitals concerning the company's finances and the valuation of its plant not necessary to be set forth in this record, it was found as a fact that the sum of $871,764.00 was a fair value of the system of the Sutter-Butte Canal Company to be used for the purposes of these proceedings. (pp. 437, 444.)

It was stated in said Opinion that the canal company had never set up a depreciation reserve but had included cost of replacements in maintenance and operation expenses. (p. 445.)

After recitals unnecessary to be set forth in this record, it was found as a fact that the sum of $72,995.00 is a fair sum to include for the annual maintenance and operation expense of the company. (Pp. 445-448.)

The Opinion then continues:

"A tabulated summary of the annual charges follows:

Interest on $871,764.00 at 8 per cent	$69,741.00
Depreciation annuity	7,572.00
Maintenance and operation expense	72,995.00
Total	$150,308.00

It is found as a fact that the above sum is a fair and just amount to be annually produced by the canal company's rate schedule.

Income

A summary of operating revenues from Sutter-Butte Exhibits U and W and Commission's Exhibit No. 1, follows:

Table VIII

Operating Revenues

Year	Revenue
1911	$19,928.00
1912	30,243.00
1913	50,617.00
[fol. 66]	
1914	$85,686.00
1915	94,268.00
1916	130,258.00
1917	124,610.00

It is obvious that the gross revenue of this company has not equaled the annual charges as set out herein

A tabulation follows showing the total area charged under the outstanding contracts and the irrigated and non-irrigated portions of this area for the years 1916-1917.

Table IX

Water Charges 1916 and 1917

Lands Charged

Rate per acre per annum	1916 Area	1916 Amount	1917 Area	1917 Amount
$1.00	10,561	$10,561	10,631	$10,631
1.50	417	626	320	480
1.50 (Gilstrap system)	577	865	1,186	1,779
2.00	12,123	24,246	16,360	32,720
4.50	607	2,732	....	....
5.00	10,470	52,350	5,384	26,920
7.00	5,554	38,878	7,440	52,080
Totals	40,309	$130,258	41,321	$124,610

Lands Charged (Not Irrigated)

$1.00	521	$521	741	$741
1.50 (Gilstrap and Sutter-Butte)	152	228	747	1,120
2.00	1,636	3,272	3,833	7,666
Totals	2,309	$4,021	5,321	$9,527

Lands Charged (Irrigated)

Rate per acre per annum	1916 Area	1916 Amount	1917 Area	1917 Amount
$1.00	10,040	$10,040	9,890	$9,890
1.50	265	398	215	323
1.50 (Gilstrap system)	577	865	544	816
2.00	10,487	20,974	12,527	25,054
4.50	607	2,732	....	....
5.00	10,470	52,350	5,384	26,920
7.00	5,554	38,878	7,440	52,080
Totals	38,000	$126,237	36,000	$115,083

Under the present rates one consumer may be paying $1.00 annually per acre while his neighbor is paying $1.50 or $2.00 per acre for the same service. This discrimination is due to the fact that the predecessor of the Sutter-Butte Canal Company issued contracts providing for a $1.00 and a $1.50 rate while the canal company issued its contracts for $2.00 for the same class of service.

That the commission cannot permit this discrimination to continue is obvious. The rates to be established in this proceeding must be uniform and nondiscriminatory in their application.

[fol. 67] The revenue of this company will be materially reduced by the elimination of the area which has heretofore been paying an annual charge but has not used water for irrigation, and which does not carry the initial charge payment.

This phase was discussed by Commissioner Thelen in Decision No. 4478, In the Matter of the Application of Madera Canal and Irrigation Company for an order authorizing increases in rates charged for water sold for irrigation, Application No. 2381, decided July 23, 1917, who states in part as follows:

"This Commission has jurisdiction to establish the rates to be paid for water sold by a public utility or the rate to be paid by a customer desiring to establish the relationship of customer and utility, (a minimum rate for readiness to serve), but not a rate to be paid by a person who does not desire to purchase water or to be placed in the status of customer of a public utility water company with the right to call on the utility for water whenever he desires to do so."

It is a difficult matter to satisfactorily estimate the area that will be cultivated to rice in the future. It appears from the evidence that at the time rice was first grown in this vicinity little was known concerning water grass and its eradication. The lang became impregnated with this weed to such an extent that it was found impossible to grow rice without discontinuing its cultivation for one or more years to eradicate this noxious weed. Thus in any year a sufficient area of land might be lying fallow or use only sufficient water to sprout the water grass which is a part of the procedure by which it is eradicated, to materially affect the income of the company. It appears, however, that experience has taught that if the

land is kept clear of this grass by exercising care and especially during the first year of its cultivation to rice this hazard can be materially reduced, if not in fact eliminated, at a reasonable expense per acre. The following tabulation shows the area cultivated to rice and other crops 1914 to 1917, inclusive:

Table X

Area Planted to Rice and other Crops, 1914-1917, Inc.

Crop	1914, acres	1915, acres	1916, acres	1917, acres
Rice	11,700	12,500	16,631	12,800
Other Crops	19,800	21,750	21,369	23,200
Totals	*31,500	*34,300	38,000	36,000

Mr. Tullock estimated that the rice area irrigated in 1918 will approximate the area irrigated in 1917.

The present national food problem has undoubtedly stimulated the cultivation of large areas additional to those which would have been cultivated in a normal period. This is especially true of rice. On the other hand, this is a business in its development and the growth was rapid even before the war emergency existed. In computing rates the area that it could be reasonably expected that the company would irrigate with the expense as set out above will be used.

[fol. 68] The canal company claims that its average loss due to uncollectible bills is 8 per cent of the gross income, and that this will continue.

This loss appears abnormal. The record shows that the percentage while large in 1912, 1913 and 1914 was reduced by 50% in 1915. The percentage of uncollectible bills was greatly increased due to the burning of the dam and floods. This has been cared for under damages.

The company henceforth will be operating under a new schedule of rates, rules and regulations such as it has been the practice of this commission to put into effect and as set out in Decision No. 2689, in the matter of the practice of water, gas and telephone utilities requiring deposits before rendering service, which provides means for the reduction of this loss to a minimum.

Such allowance will be made in estimating income from rates for this element as seems fair and reasonable under the conditions obtaining.

A small portion of the area served by this company is above the level of the ditches and it is necessary to render the additional service of pumping.

I believe that it is unjust that this expense be borne by the consumers at large and shall recommend that a charge of $1.00 per acre for rice and 50 cents per acre for other crops be established for this service.

*No deduction for nonirrigated area.

Form of Rate

Messrs. Hawley and Loveland both testified that the only method whereby the burden of the expense of this system can be equitably distributed among the consumers is through the establishment of a measured rate schedule whereby each consumer will pay on a quantity basis for the water used. The canal company asks that both a flat rate and measured schedule be established leaving it optional with either party whether or not a measuring device be installed. In regard to the advisability of selling water on a measured rate base, I can do no better than quote Commissioner Thelen in Decision No. 4478, In the Matter of the Application of Madera Canal and Irrigation Company for an order authorizing increases in rates charged for water sold for irrigation, Application No. 2381, decided July 23, 1917, as follows:

"While I appreciate that the consumers under this system have long been accustomed to a rate based on the number of acres irrigated and hence naturally cling to it, I am convinced that the acre-foot rate is fundamentally right and should be adopted under this system. The acre-foot rate is right, (1) because it is fundamentally just that each consumer should pay for what he receives, which can be done only by measuring the water; and, (2) because the sale of water by measure creates prudence in the use of water and checks waste, increases the amount of water available to the community and [fol. 69] thus helps to develop a large acreage and to increase the general prosperity.

"The canal company is willing to install and operate the necessary measuring devices in connection with an acre-foot rate and asks authority to do so.

"I am satisfied that after a fair test, the consumers under this system will agree that the acre-foot form of rate is more just and constructive than the acre rate heretofore in effect."

Rate Schedule

After a careful consideration of all the evidence in these proceedings, I find as a fact that the following are fair and reasonable rates to be charged by Sutter-Butte Canal Company for water delivered from its canals and laterals.

Flat rate:

Rice, $7.00 per acre per year.
Grain irrigation, 50 cents per acre per irrigation.
Plowing for water grass, first irrigation, $1.00 per acre; subsequent irrigation, 50 cents per acre per irrigation.
All other crops, $2.50 per acre per year.

Measured rate (rice irrigation):

Where water is measured, the rate shall be as follows:
Minimum charge per acre per year:

Rice irrigation, $4.00 for 3-acre-feet or less.
Grain, water grass or plowing, 75 cents for ½ acre-foot or less.
All other crops, $2.00 for 1½ acre-feet or less.
Excess at the rate of $1.25 per acre-foot.

Heretofore the relation between the canal company and its consumers has been established by contract.

The canal company now asks that in view of the fact that the consumers have paid the so-called water right or initial charge that it would be unfair to increase their rate without considering this fact and request that the rates which have heretofore been charged, as set out in the Sutter-Butte contracts ($5.00 per acre for rice and $2.00 for all other crops), remain in effect. It is obvious from the foregoing analysis of the rate that this is an appreciable reduction. Complainants in Case No. 1083 also ask that consideration be given the fact that they have made an advance payment on rates and that a lower rate be esablished for them and anyone who desires to enter the same class by paying an initial charge, than for the consumer who pays from year to year without making this advance payment.

A large portion of the users of water from this system have paid an initial charge of $10.00 per acre and whether this payment was for water rights or in the nature of an advance payment on rates as [fol. 70] a part of the water rental, the consumers have paid it and it seems unfair that new consumers who have not made a similar advance should receive service at the same cost as those who have made this payment. As stated by Commissioner Thelen in Decision No. 2531, In the Matter of the Application of James A. Murray and Ed Fletcher, and La Mesa, Lemon Grove and Spring Valley Irrigation District, Application No. 1432, Vol. 7, Opinions and Orders of the Railroad Commission of California, p. 373:

"On the other hand, in the absence of a decision by the Supreme Court of this State holding that those moneys can be recovered, the Railroad Commission would be inclined in so far as it could, on the facts of this case, to give effect, in equity, to the moneys thus paid and to regard them, in so far as it can do consistently with the establishment of uniform rates and the prevention of discrimination, as advance payments on rates, so that the consumers holding these contracts will have the normal rates which they otherwise would be compelled to pay, reduced to the extent of reasonable interest on the moneys which they have paid."

This question was also discussed by Commissioner Eshleman in Decision No. 536, being Application of James A. Murray and Ed Fletcher, Application No. 118, Vol. 2, Opinions and Orders of the Railroad Commission of California, p. 501:

"Before leaving this subject, however, I think it well to say that contracts entered into in good faith between public utilities and their patrons that are not forced or compelled in any way and are based upon an adequate consideration should be adopted so far as is con-

sistent with adequate regulation as the basis for the rates for the service performed by a public utility for its patrons."

I can see no reason why these contract rates should not be continued in effect without discrimination if a rate schedule be established that will permit of a prospective consumer receiving the same rate by paying an initial charge or paying a higher rate if without this charge. I believe it would but work justice to those consumers of the canal company who have paid this initial charge to establish the lower rate. The existing discrimination between the various contract holders should be removed, however, and I recommend that in addition to the schedule set out above there be established a rate schedule including an initial charge.

Of the 40,943 acres under contract, slightly in excess of 30,000 have contracted at the $2.00 per acre rate. All the contracts for rice irrigation provide for the payment of $5.00 per acre per year.

The rate of $5.00 for rice irrigation and $2.00 for all other crops with an initial payment of $10.00 is substantially in accord with the rule declared in the Cuyamaca case, supra.

I find as a fact that the following are just and reasonable rates:

[fol. 71] Initial Payment ..... $10.00 per acre.
Rice Irrigation ..... 5.00 per acre per year.
All other crops ..... 2.00 per acre per year.

The rules and regulations herein provided cover all essential dealings with consumers." (pp. 448-454.)

After certain recitals not necessary to be set forth in this record the Opinion continues as follows:

"The contracts heretofore in effect provide for payment of the entire rate on September 1 of each year. Although there was no objection to this at the hearing, I am of the opinion that the payment of the entire charge at one time works a hardship on the consumer and I shall recommend that the payments be made as follows:

Flat rates (rice lands):

$1.00 per acre to accompany application.
3.00 per acre payable on or before February 1st.
3.00 per acre payable on or before July 1st.

Other crops:

$0.50 per acre to accompany application.
1.00 per acre payable on or before February 1st.
1.00 per acre payable on or before July 1st.

Measured rates (rice lands):

$1.00 per acre to accompany application.
3.00 per acre payable on or before February 1st.

Use over 3 acre feet per acre payable at end of month of use.

Other crops:

$0.50 per acre to accompany application.
1.50 per acre on or before February 1st.

Use over 1½ acre-feet per acre payable at end of month of use.

Measuring devices are not at present installed on this system. It should be the privilege of either the consumer or the company to apply the measured rate, which rate must remain in effect until this commission's consent is obtained to the substitution of another form of rate. The cost of the measuring devices must under the decisions of this commission ultimately be borne by the untility. However, where the consumer asks to be served under the measured rate, I believe the canal company should be permitted to require a deposit to cover the cost of installation, which deposit must be returned to the consumer at the end of one year, either in cash or as a credit on rates." (pp. 455-456.)

After certain recitals dealing with Cases Nos. 1062 and 1083 which involve no question now in controversy between the parties to this case, the decision closed with the following order:

[fol. 72] "It is hereby ordered as follows:

(1) Sutter-Butte Canal Company is hereby ordered to establish and file with the Railroad Commission, on or before twenty (20) days from the date of this order, the following rates for water:

Schedule No. 1

Flat rates:

Rice irrigation, $7.00 per acre per year.
Grain, 50 cents per acre per irrigation.
Water grass or plowing, $1.00 per acre first irrigation.
Water grass or plowing, 50 cents per acre each subsequent irrigation.
All other crops, $2.50 per acre per year.

Schedule No. 2

Measured rates—minimum charge per acre per year:

Rice irrigation	$4.00 for 3	acre-feet or less.
Grain and water grass	.75 for ½	acre-foot or less.
All other crops	2.00 for 1½	acre-feet or less.
Excess at the rate of	1.25	per acre-foot.

Schedule No. 3

Initial charge ..... $10.00 per acre.

Annual charges—flat rates:

Rice irrigation	$5.00 per acre.
All other crops	2.00 per acre.

Measured rates—minimum::

Rice, $3.00 per acre per year for 3 acre-feet or less.
All other crops, $1.50 per acre per year for 1½ acre-foot or less.
Excess at the rate of $1.25 per acre-foot.

(2) Sutter-Butte Canal Company shall file and put into effect within twenty (20) days from the date of this order, revised rules, regulations and contracts to conform with the finds herein and with the rules laid down by the commission in its Decision No. 2879, Vol. 8, Opinions and Orders of the Railroad Commission of California, p. 372.

It is further ordered that in all other respects these proceedings be and the same are hereby dismissed." (pp. 458-459.)

The statement in said Decision No. 5227 of the provisions of the then outstanding contracts for furnishing water to consumers of said Sutter-Butte Canal Co. is correct so far as said provisions are stated in said decision; that in addition to said statement the following provisions are contained in said contracts:

In the form of contract described in said decision as the first of the [fol. 73] six forms of agreement outstanding, it is provided that the contract "shall forever bind the heirs, executors, administrators and assigns of each party" (i. e., the Canal Company, of the first part, and the contracting consumer, of the second part); that the contract is entered into "for and in consideration of the mutual covenants and considerations herein set forth;" that the water agreed to be furnished "shall not be used by the party of the second part on any lands except those herein described, nor shall the same be by him permitted to go to waste or be discharged upon other lands; and where practicable he shall convey any surplus water back into the canal or branch thereof of the party of the first part;" that "if at any time the quantity of water flowing in the main canals shall be less than the full capacity thereof, each piece of land covered by water contracts with the party of the first part shall be entitled only to its proportional share of the water then flowing," and that the Canal Company "shall not be held responsible for any deficiency of water caused by drought, insufficient water in the river, adverse appropriation, hostile diversion or obstruction, court injunction, or any injury by the elements to the irrigation works; but said party of the first part shall use due diligence in restoring and protecting the flow of water in its canals and ditches."

In each of the other forms of contract mentioned in said Decision No. 5227, excepting what is therein described as the "short-term form of contract for water for rice irrigation," it is provided that the same "shall forever bind the heirs, successors and assigns of each party;" that "the party of the first part agrees to furnish to the party of the second part, from its main canal (quantity of water inserted), cubic feet of water per second for the purpose of irrigating the following described land, to-wit: (description of land inserted), from the date hereof and thereafter during the term of the corporate existence of the first party, its successors or assigns;" and in addition to what is stated in said Decision No. 5227, and to

[fol. 74] what is stated above, said other forms of contract contain the following provisions:

"The party of the second part, in consideration of the construction of said main canal and ditch rights and delivery of water, agrees to pay to the party of the first part, at its office in gold coin of the United States, annually, on the first day of each September hereafter, during the life of said corporation, its successors and assigns, the sum of (sum inserted) Dollars."

"It is understood that first party will contract for the delivery of 1,000 cubic feet of water per second, and if at any time the quantity of water flowing in its main canals, except through lack of capacity, shall be less than 1,000 cubic feet per second, then each party holding agreements with the party of the first part shall be entitled only to his proportional share of the water then flowing, and such lesser quantity shall be a full performance by first party of agreement in Paragraph One hereof, it being understood and agreed that the party of the first part shall not be held responsible for any deficiency of water caused by drought, insufficient water in the river, adverse appropriation, hostile diversion, or obstruction, court injunction, or any injury by the elements to the irrigation works, but said party of the first part shall use due diligence in restoring and protecting the flow of water in its canals and ditches."

Said "rules laid down by the Commission in its Decision No. 2879, Vol. 8, Opinions and Orders of the Railroad Commission of California, p. 372," referred to in said Decision No. 5227, contains the following provision:

"Except in the case of extensions in unincorporated territory, which matter is left open for consideration in subsequent proceedings, and of extensions in incorporated territory in cases in which the commission may hereafter authorize the signing of contracts for service, a water, gas, electric or telephone utility may not require that an applicant sign a contract for service as a condition precedent to service; provided, that such utility may require that reasonable written application for service be made."

Pursuant to said Decision No. 5227 and said order therein, the Sutter-Butte Canal Company filed its revised rules and regulations and schedule of rates with said Railroad Commission of California. Said revised rules and regulations and schedule of rates were approved by said Railroad Commission and went in effect April 30, 1919. The following is a copy of the provisions of said revised rules and regulations pertinent to the controversy in the present case, and said schedule of rates:

[fol. 75] "1. Applications for water must be made on the printed forms of the Company and filed with the Company not later than January first of the year in which service is desired, except that in case it is necessary to construct, extend or enlarge any ditch in order to serve, application must be made on or before October first preceding the year in which service is desired. • • •

2. Consumers must notify the Company in writing before the above mentioned dates if service is to be discontinued for the following irrigation season. The consumer will be charged and shall pay at the regular rate until such notice is received. The foregoing as to discontinuance of service does not apply to holders of contracts for continuous furnishing of water."

"Rates and Time of Payment"

Schedule I—Flat Rates

Rice Irrigation

First year:

$1 per acre to accompany application.
$3 per acre payable on or before February 1st, plus 50 cents per acre if water is pumped.
$3 per acre payable on or before July 1st, plus 50 cents per acre if water is pumped.

Subsequent years during continuance of service:

$4 per acre payable on or before February 1st of each year, plus 50 cents per acre if water is pumped.
$3 per acre payable on or before July 1st of each year, plus 50 cents per acre if water is pumped.

Grain (Other Than Rice) Irrigation

50 cents per acre to accompany application, plus pumping charge at rate of 20 cents per acre if water is pumped.
50 cents per acre for second and each subsequent irrigation during continuance of service, payable before each irrigation, plus last mentioned pumping charge if water is pumped.

All Other Crops

First year:

50 cents per acre to accompany application.
$1 per acre payable on or before February 1st, plus 25 cents per acre if water is pumped.
$1 per acre payable on or before July 1st, plus 25 cents per acre if water is pumped.

[fol. 76] Subsequent years during continuance of service:

$1.50 per acre payable on or before February 1st of each year, plus 25 cents per acre if water is pumped.
$1 per acre payable on or before July 1st of each year, plus 25 cents per acre if water is pumped.

For Summer Plowing or for Sprouting Water Grass, Weeds, etc., in Order to Eradicate same and not for Purpose of Raising Crops in Same Season or Year:

$1 per acre (first flooding) to accompany application, plus pumping charge at rate of 20 cents per acre foot if water is pumped.

50 cents per acre for second and each subsequent flooding in same year for same purpose, payable before each flooding, plus last mentioned pumping charge if water is pumped.

Schedule II—Measured Rates

Rice Irrigation

First year:

$1 per acre to accompany application.

$3 per acre for 3 acre feet or less per acre, payable on or before February 1st, plus pumping charge at rate of 20 cents per acre foot if water is pumped.

For water used in excess of 3 acre feet per acre, additional payment to be made therefor at rate of $1.25 per acre foot, plus pumping charge at rate of 20 cents per acre foot if water is pumped; same to be paid at end of month of use.

Subsequent years during continuance of service:

$4 per acre for 3 acre feet or less per acre, payable on or before February 1st of each year, plus pumping charge at rate of 20 cents per acre foot if water is pumped.

For water used in excess of 3 acre feet per acre, additional payment to be made therefor at rate of $1.25 per acre foot, plus pumping charge at rate of 20 cents per acre foot if water is pumped; same to be paid at end of month of use.

Grain (Other Than Rice) Irrigation

75 cents per acre for ½ acre foot or less per acre to accompany application, plus pumping charge at rate of 20 cents per acre foot if water is pumped.

After first year, and during continuance of service, above minimum rate, plus last mentioned pumping charge if water is pumped, is payable on or before February 1st of each year.

For water used in excess of ½ acre foot per acre, additional payment to be made therefor at rate of $1.25 per acre foot, plus pumping charge at rate of 20 cents per acre foot if water is pumped; same to be paid at end of month of use.

[fol. 77]

All Other Crops

First year:

50 cents per acre acre to accompany application.

$1.50 per acre for 1½ acre feet or less per acre, payable on or before February 1st, plus pumping charge at rate of 20 cents per acre foot if water is pumped.

For water used in excess of 1½ acre feet per acre, additional payment to be made therefor at rate of $1.25 per acre foot, plus pumping

charge at rate of 20 cents per acre foot if water is pumped; same to be paid at end of month of use.

Subsequent years during continuance of service:

$2 per acre for 1½ acre feet or less per acre, payable on or before February 1st of each year, plus pumping charge at rate of 20 cents per acre foot if water is pumped.

For water used in excess of 1½ acre feet per acre, additional payment to be made therefor at rate of $1.25 per acre foot, plus pumping charge at rate of 20 cents per acre foot if water is pumped; same to be paid at end of month of use.

For Summer Plowing or for Sprouting Water Grass, Weeds, etc., in Order to Eradicate Same and Not for Purpose of Raising Crops in Same Season or Year

75 cents per acre for ½ acre foot or less per acre to accompany application, plus pumping charge at rate of 20 cents per acre foot if water is pumped.

For water used in excess of ½ acre foot per acre, additional payment to be made therefor at rate of $1.25 per acre foot, plus pumping charge at rate of 20 cents per acre foot if water is pumped; same to be paid at end of month of use.

Schedule III—Initial Payment Rates

$10 per acre to accompany application, unless otherwise provided by agreement.

Rice irrigation—Flat rates:

$2.50 per acre payable on or before February 1st of each year during continuance of service, plus 50 cents per acre if water is pumped.

$2.50 per acre payable on or before July 1st of each year during continuance of service, plus 50 cents per acre if water is pumped.

[fol. 78] Rice irrigation—measured rates:

$3 per acre feet or less per acre, payable on or before February 1st of each year during continuance of service, plus pumping charge at rate of 20 cents per acre if water is pumped.

For water in excess of 3 acre feet per acre, additional payment to be made therefor at rate of $1.25 per acre foot, plus pumping charge at rate of 20 cents per acre foot if water is pumped; same to be paid at end of month of use.

All other crops—flat rates:

$1 per acre payable on or before February 1st of each year during continuance of service, plus 25 cents per acre if water is pumped.

$1 per acre payable on or before July 1st of each year during continuance of service, plus 25 cents per acre if water is pumped.

All other crops—measured rates:

$1.50 per acre for 1½ acre feet or less per acre, payable on or before February 1st of each year during continuance of service, plus pumping charge at rate of 20 cents per acre foot if water is pumped. For water used in excess of 1½ acre feet per acre, additional payment to be made therefor at rate of $1.25 per acre foot, plus pumping charge at rate of 20 cents per acre foot if water is pumped; same to be paid at end of month of use."

"4. Payment for service under the schedule of flat rates and the minimum payments of the measured rate schedule are due and payable as provided above and before service is rendered. If not paid as provided, the Company may discontinue service after thirty days' written notice. Service will not be restored until the amount due is paid, together with interest at the rate of 8% per annum, and credit is established as herein provided."

"17. Water must be used only on the area described in the application. For violation of this rule, water will be turned off and service will not be restored until payment is made at the established rates for the area described in application, plus other areas irrigated."

Exhibit D, attached to the petition to the Supreme Court of the State of California filed on June 21, 1922, by the above named plaintiffs in error, mentioned in paragraph 2 of the Joint Præcipe and Stipulation herein, is a true copy of the Sutter-Butte Canal Company's form of application for water put in use pursuant to said Decision No. 5227 and said orders of the Railroad Commission of California.

[fol. 79] The persons who since that decision have established their relation with the Sutter Butte Canal Company as consumers of its water by filling out and signing the said form of application, and whose applications have been accepted by said Company, constitute the class referred to in this proceeding as the non-contract consumers. The consumers who hold the contracts referred to in Decision No. 5227 are the class referred to in this proceeding as the contract consumers, or contract holding consumers, and the last sentence of Rule 2 of the Sutter-Butte Canal Company, quoted above, refers to this class of consumers.

In cases where water is used for producing rice, the contracts provide for the furnishing of water at the rate of three cubic feet per second for each 160 acres of land.

In prior proceedings before said Railroad Commission of California, above referred to, it was shown that the irrigation season in the territory served by said Sutter-Butte Canal Company commences around the latter part of April or in May of each year, and extends through the succeeding months of June, July and August, and into the months of September or October, and then ceases; that is to say,

the Sutter-Butte Canal Company commences to furnish and its consumers commence to use water for irrigation purposes in each year in the month of April or May, and the use thereof is discontinued in the succeeding September or October.

During the proceedings before the Railroad Commission in the present cause, in regard to the matters in controversy upon the pending Writ of Error to the Supreme Court of the United States, in addition to the matter herein set forth, the following proceedings took place:

Mr. Brittain (attorney for the present plaintiffs in error): I should like to have a construction of the Commission's own decision in 1918.

The order made by the commission and directed to be sent to the consumers here, extending the period of time from January 1st to January 15th for applications for water to be filed, has been sent to the people that I represent in accordance with the order of the Com- [fol. 80] mission, and when I came up here I found this condition—perhaps it would be better, so that there may be no misunderstanding of the question I am asking, if I explained this matter. In the opinion of the Commission in 1918—I am reading from page 26 of the opinion in the pamphlet sheet:

"Under the present rates one consumer may be paying $1.00 annually per acre, while his neighbor is paying $1.50 or $2.00 per acre for the same service. This discrimination is due to the fact that the predecessor of the Sutter-Butte Canal Company issued contracts providing for a $1.00 or $1.50 rate, while the canal company issued its contracts for $2.00 for the same class of service.

"That the Commission cannot permit this discrimination to continue is obvious. The rates to be established in this proceeding must be uniform and non-discriminatory in their application.

"The revenue of this company—and I want to call particular attention to this language, because this is the language I should like to have construed—

"The revenue of this company will be materially reduced by the elimination of the area which has heretofore been paying an annual charge, but has not used water for irrigation, and which does not carry the initial charge payment."

Again another page in connection with the same matter, on page 30 of the pamphlet opinion in—after quoting the statement of Mr. Commissioner Thelen in Decision No. 2531, in the matter of the Application of Murray and Fletcher and La Mesa Lemon Grove, and Spring Valley Irrigation District, and the language of Mr. Commissioner Eshelman, in Decision No. 536, on the application of Murray and Fletcher, in this case the Commission further said, or the writer of the opinion:

"I can see no reason why these contract rates should not be continued in effect without discrimination if a rate schedule be established that will permit of the prospective consumer receiving the

same rate by paying an initial charge, or paying a higher rate if without this charge, I believe it would but work justice to those consumers of the canal company who have paid this initial charge to establish the lower rate. The existing discrimination between the various contract holders should be removed, however, and I recommend that in addition to the schedule set out above there be established a rate schedule including an initial charge."

I am informed that the Company, notwithstanding that very plain language of the Commission, the Company's agents here have been refusing to deliver water, unless applicant should pay the full two-dollar rate for all the land that they own, and in one particular in-[fol. 81] stance where a man, a consumer of the water, owns 160 acres of land, he irrigates 80 acres, and he is required to pay, under penalty of having the charge become a lien upon his land, he is required to pay $2.00 an acre for 160 acres. In other words, he is not paying two dollars an acre which the Commission directed that he should pay, but he is paying $4.00 an acre for the land he irrigates.

Now, in view of the requirement that these men shall file applications before January 15, I have been asked by them that they may be protected as against that unjust, and, in my opinion, unlawful collection on the part of this company. I don't want to ask the Commissioner to construe the language which I have just read without reading the entire opinion, but before we close tomorrow, or before we leave these hearings, it is necessary and fair and right that the Commission should indicate to these consumers here, confronted as they are with the necessity of acting at their peril, in regard to whether or not they may file their applications for the amount of water that they are going to use and make the payments that the Commission, in this opinion, requires that they shall make when they make their applications.

And unless Mr. Brookman is prepared to state at this time, and I don't suppose that he is, until he has had an opportunity to think it over, that these people are only to pay for the acreage that they are having water for, in accordance with the statement of the Commission, as I read that statement, we will ask at this time for a construction by the Commissioner himself as to the meaning of this language. It is not right that these people should be compelled either to pay what the Commission has said they need not pay, or be threatened with a lien imposed upon their land, which will cloud the title to their land, and there are cases of that sort here, where a landowner was unable to sell his land, because of an existing lien imposed for a debt which was unjust and unwarranted and unlawful, and we would like to have a ruling on that, we think it is a matter that ought to be ruled upon directly. I was most amazed this afternoon, in speaking casually with Mr. Brookman about this after the adjournment this afternoon—I don't want to discuss a private conversation, Mr. Brookman, publicly—to learn that perhaps the same condition exists which we have found to exist in so many of these utility cases where, without the knowledge on the part of

the utility company, or without the knowledge of their attorneys, perhaps, exactions have been made through ignorance on the part of some employe of the rights of the company, through over-zealous actions on the part of some employe, or something of that sort, but I think that we are entitled, that these consumers are entitled to know just what the Commission meant when it used that language three years ago, and we will ask, and I am making the statement now so that the Commissioner may have ample time to consider the matter before making a ruling, that we shall ask, before these hearings are adjourned, and before these people are compelled to decide for themselves what they shall pay, in view of the plain language of the Commission, I would like to have that taken under consideration, and we will ask for some indication of the views of the commission on that.

[fol. 82] Commissioner Martin: All right, Judge. (Reprs. Tr. pp. 172-175.)

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Mr. Brookman (attorney for defendant in error Sutter-Butte Canal Company): The matter to which Judge Brittain refers, it appears to me, is not strictly a matter of rates, it is a matter of practices. It is somewhat covered by the rules and regulations of the company. I am not wholly satisfied in my own mind that it is a matter that properly is involved in this rate application; it appears to me, on the contrary, that it may be a related matter, but still is one that falls within the purview of the rules and regulations, and the application of the rates to the practices of the Company, and I think we are extending the issues here beyond the scope of the application to consider those matters which are matters of rules and regulations and practices.

At the same time the Company is very eager to have this matter satisfactorily determined, and we feel that there should be no difficulty in getting an agreement on the matter. It would be my suggestion that, if practicable, we might have a discussion of this at some appropriate time in San Francisco before the presiding Commissioner, at which possibly, the attorney for the Commission should be asked to participate, and consider this particular question, but not as one which is directly involved in this proceeding, or as one, the conclusion of which necessarily should precede the ultimate conclusion of the rates to go into effect on this application.

Mr. Brittain: Mr. Commissioner, I don't want to precipitate an argument, but the matter is of very urgent and present importance, in view of the attitude of the company. Their attention has already been called to the fact that the application of the company itself in this proceeding was somewhat indefinite, and we haven't yet learned just what the company contends in this case, not just what it expects the Commission to do for it.

The prayer of the application is:

"Applicant prays that this Honorable Commission make its order authorizing applicant to put into effect such increased rates as this Honorable Commission may determine to be just and reasonable, that

this matter be determined as soon as possible in order that such increased rates as are authorized by this Honorable Commission may be known by all interested parties prior to January 1st of next year, and for such other relief as to this Honorable Commission may seem just in the premises."

The Commission has made its order extending the time for making applications to January 15th. Whether the rates be increased for the year 1922, or not, the matter is one affecting rates, as my read- [fol. 83] ing of the decision of the Commission in 1918 clearly incated that the Company should not demand, should not receive payments for lands which are not irrigated; the Company has been demanding and been receiving such payments; the consumers who were, prior to the decision of 1918, operating the contracts, the old contracts, have been paying what we believe to be the exorbitant demands of the company since that time. They are now confronted with this question: Whether in making their applications under Rule 1 of the Company for water in 1922 if they make application for water for the acreage that they intend to irrigate in 1922 and tender the 50-cent advance payment required by the Commission for that acreage, take the man with 160 acres of land, who will irrigate only 80, whether he shall pay an advance payment of 50 cents an acre for 80 acres, whether the company will refuse to accept his application, or whether the company will demand of him 50 cents an acre on 160 acres, or the equivalent of one dollar an acre for the 80 acres, is a matter of very vital and very pressing importance, and a matter which we want to hear what counsel have to say in regard to that claim before January 1st, in order that we may be able to advise our clients just what tender to make to preserve their legal rights, just what price to offer if they apply, or whether or not they should not make their deposit, under the general rules of the Commission, with the Commission itself, in order that the matter may be fought out. We must know.

I can realize perfectly well the feeling which you, sir, have in regard to placing a construction in a hurried way on the language used by your predecessor, who happens to be, in this case, the attorney for the Sutter-Butte Canal Company. I can understand the delicacy of that position, and can understand that you will probably want to refer the matter to the Commission for its action, but we certainly want, right at this time, and before January 1st, or January 15th, to know the attitude of the company.

It has been stated—I don't like to quote a conversation in part private—it has been suggested that we can come to some agreement. I don't understand how we can agree as to whether there is a contract, or not, which has any binding force. That is purely a matter of law that we cannot agree upon. Those contracts either have binding force, or they have not, and we want to know the attitude of the Company in regard to the matter, in order that we may advise these people how they may preserve their rights.

Commissioner Martin: Judge, is it your opinion that those contracts have no binding force, or no force at all?

Mr. Brittain: I should like, rather than answering that question——

Commissioner Martin: I mean is that your attitude?

Mr. Brittain: Rather than answer that question simply in a word, I should like to lay before the Commission at this hearing my views in that regard, and I shall reach the conclusion, I am quite sure, and hope the Commission will reach the conclusion, that those contracts cannot be severed, that they are either contracts which bind the company as to rates, that they contracted for, or that they do not bind the consumer as to other onerous conditions of the contracts; [fol. 84] they are either contracts, or they are not, they are not severable, and I shall be glad to lay before the Commission, and ready to do so now, and ask, on behalf of these consumers, the right to do so some time before the adjournment of this hearing, and will ask for an hour to be set for that purpose, a matter which should be taken up, and taken up now because of the demand of the company for adjustment of this matter prior to its 1922 business, and it is just as important for these consumers to know where they stand prior to the opening of the 1922 business, and it is right that the matter should be laid before the Commission and laid before the Commission in this proceeding.

If the Commission wants further information, if counsel wants further information, wants an opportunity to examine the law in the matter, that may be extended, but we ought to have at least the attitude of the company in regard to these matters. They tell me that they can agree with me upon certain matters, they tell me that some of these men may believe that they will be better off if they have the contracts. It is a very serious question whether they can make, even though a consumer may desire, a private bargain which, in effect, doubles the rates fixed by the Commission; I don't believe that such a bargain would have any legal force, and I don't propose that my clients shall be placed in a position where they don't know whether they are bound or loose.

Commissioner Martin: Judge, according to your interpretation, did the Commission in the—I don't know the number of this decision——

Mr. Brittain: The decision of 1918. I had not referred to the number of it.

Commissioner Martin: In Decision 5227 did the Commission at that time undertake to dispose of the matter of the contracts, or did it not, or did they from their standpoint, feel that they had done so, in your judgment?

Mr. Brittain: I can answer that question in this way: regardless of what the Commission intended——

Commissioner Martin: I mean according to your interpretation of it.

Mr. Brittain: I am answering your question, Mr. Commissioner, to the best of my ability. Regardless of what was in the minds of the Commission, what was in the mind of Mr. Devlin, who is now the attorney for this company, what was in the mind of Mr. Brookman, who was then the attorney for the Commission, and is now

attorney for this company, regardless of what was in the minds of either of those gentlemen at the time that opinion was written, certain legal consequences followed that decision, and it is upon those legal consequences that I desire to be heard, and I think that I can very clearly point out to your Honor, in the course of an orderly presentation, and not by being asked to reply to categorical questions, I think that I can show to the Commission that, in the opinion itself it was, and necessarily must have been then in the mind of Mr. Devlin that those contracts no longer had binding force, from the [fol. 85] language used by Mr. Devlin himself, and it is for the orderly presentation of that that I am now asking for an hour to be set prior to the adjournment of this hearing, that I may present that matter to your Honor in an orderly and logical way rather than by answering categorical questions. I ask for that time.

Commissioner Martin: Passing upon the request of counsel for an hour to be heard upon the matter upon which he has just addressed the Commission, we will have the matter taken up just after the reconvening following the afternoon recess. (Reprs. Tr. pp. 177-183.)

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Mr. Brittain: It was stated yesterday that in representing certain groups of consumers of the Sutter-Butte Canal Company, there is, or possibly may be a few who, notwithstanding what I have said to them, may think still that they have some rights under the pre-existing contracts referred to by the Commission in the decision of 1918, and that their legal rights would not be affected by the presentation which I want to make, and the motion I want to make on behalf of the group of consumers. They are excepted from the presentation that I make, and I shall not represent them, and can take, of course, no conflicting positions.

Mr. Brookman: Just who are you speaking for when you make this argument, now Judge Brittain?

Mr. Brittain: Speaking for the group of consumers referred to in the former opinion of 1918, as operating under various pre-existing contracts, excepting from what I have to say any particular individual who may believe, notwithstanding my view of the law of the matter, that he has a legal right to question the decision of the Commission in the matter. I don't know that any one, and don't anticipate that any one will, but there may be, and I simply want it understood that in presenting my views of the matter for the group, that no particular individual shall be met by the Commission, or by the Company with the contention that he is taking a position contrary to the position which he may be advised by other counsel to take, after the decision of the Commission, for which I am acting. I cannot possibly ask these men to determine in advance of a decision what their views will be in regard to the decision, but I can give you this assurance, that under the advice that I have given them I personally believe that there will be very few who will have any different view in regard to their legal rights than that expressed by the Commission if the Com-

mission expresses the view that I think the Commission ought to express.

Mr. Brookman: Can we have a list of those whom you represent, whether you speak for them one way or the other?

Mr. Brittain: We represent these people, the record shows that we represent these people as a group. Now, there may be in that group men that I don't know who may have, or may think they have some different legal status than the men for whom I am speaking generally in the group, and all that I am asking in that regard is that they shall not be met with the contention that I have waived any of [fol. 86] their—any rights which they believe they may have in presenting for the great mass of men in that group the views that I have to express.

Mr. Brookman: Can you give us the list of the people comprising the group? That is what I want to know, who are the users that you represent?

Mr. Brittain: I don't know. I assume that we can get it, in the course of a few days. I haven't it now. I assume we can get it between now perhaps, and the next hearing, we can get a list of the members of the Butte County Farm Bureau and the Sutter County Farm Bureau, the two water users associations, I believe, that we represent, do we not, Mr. Nelson?

Mr. Nelson: There is one, the Live Oak.

Mr. Brittain: The Live Oak Water Users Association, and can submit the list of all those people to you.

Mr. Brookman: That was promised for this hearing, but I think we would like to have the list.

Mr. Brittain: That was not promised at this hearing, according to my reading of the record. We did promise to give you, if we could, the list of those for whom we appeared specially, and we have not—we are not appearing for any others than those expressly named in our appearance, and therefore, there is no added list to be made. May I see that record just a minute?

Mr. Brookman: Yes. On page 72, I asked this question: "How soon"——

Mr. Brittain: I think I can simplify that if you will let me look at that a moment.

Mr. Brookman: I would like to read what I said. I asked this question: "Q. How soon are we to know whom you represent?" Mr. Nelson said: "I stated whom I represent." "Mr. Brookman: You said you were going to prepare a list." "Mr. Nelson: That special list I will be able to give you as soon as I get back to the office. I will send a copy to the Commission as well."

Mr. Brittain: Permit me to answer the question Mr. Brookman asked. I read from page 2 of the record. Mr. Nelson appeared for the "Live Oak Water Users' Association, Butte County Farm Bureau, California Farm Bureau Federation, C. W. Thresher, W. G. Coppernoll," and to that list for whom we appeared generally has been added the Sutter County Farm Bureau. "And appearing specially for L. E. Wallace and other persons for the purpose of resisting the juris-

diction of the Railroad Commission to rule as to these persons who hold contracts."

There is nothing to be added to that list than the name of L. E. Wallace, and I am informed that the interest of Mr. Wallace is now under negotiations to pass to Mr. Ames, and I can assure you there [fol. 87] will be no special contention under that head, and I can give you no list in advance of people who may be dissatisfied with any ruling of the Commission until we know what the ruling of the Commission is going to be. I think that is a matter which will clear itself up.

In the former presentation of this matter, and I am not like my very good friend, Mr. Truman, I have no apology to make for being here, I haven't an eleven thousand dollar interest in the Sutter-Butte Company. I am here simply as a lawyer, because it is part of my duty as an officer of the State to be here, having been retained to make this presentation.

Inasmuch as the California Railroad Commission, in its decision No. 5227, decided March 25th, 1918, considered the status of certain consumers of water supplied under pre-existing contracts between them and their predecessors and the Sutter-Butte Canal Company, and in the opinion incorporated in said decision said commission did use the following language:

"Under the present rates one consumer may be paying $1.00 annually per acre while his neighbor is paying $1.50, or $2.00 per acre for the asme service. This discrimination is due to the fact that the predecessor of the Sutter-Butte Canal Company issued contracts providing for a $1.00 and $1.50 rate, while the canal company issued its contracts for $2.00 for the same class of service.

"That the Commission cannot permit this discrimination to continue is obvious. The rates to be established in this proceeding must be uniform and non-discriminatory in their application.

"The revenue of this company will be materially reduced by the elimination of the area which has heretofore been paying an annual charge, but has not used water for irrigation, and which does not carry the initial charge payment.

"This phase was discussed by Commissioner Thelen in Decision No. 4778, in the matter of the application of Madera Canal and Irrigation Company for an order authorizing increases in rates charged for water sold for irrigation, Application No. 2381, decided July 23, 1917, who states in part as follows:

" 'This Commission has jurisdiction to establish the rate to be paid for water sold by a public utility, or the rates to be paid by a customer desiring to establish the relationship of customer and utility (a minimum rate for readiness to serve) but not a rate to be paid by a person who does not desire to purchase water, or to be placed in the status of customer of a public utility water company with the right to call [fol. 88] on the utility for water whenever he desires to do so.' "

Inasmuch as further, notwithstanding the said decision, the said Sutter-Butte Canal Company has demanded and received, since

said decision, payment from those customers referred to in the portion of said opinion just quoted, payment of a rate to be paid by persons who did not desire to purchase water, and, inasmuch as said Sutter-Butte Canal Company, under its Rule 1 as modified by California Railroad Commission, so that application for water may be made at any time prior to January 15, 1922, requires an application for water to be filed prior to said date last mentioned, and further requires that each application shall be accompanied by an advance payment of money computed on the number of acres of land chargeable with water rates for services in 1922, and, inasmuch as the said Sutter-Butte Canal Company asserts the right to be paid water rates at the scheduled amounts, and to receive the advance payments for every acre of land owned or described in the contracts referred to in the quotation from said decision, notwithstanding the fact that many customers will require and use water for a part of their lands only, and are ready, able and willing to pay for the same at the rates fixed in said decision, or as said rates may hereafter be changed, and, inasmuch as an issue exists as to the meaning of said decision, and particularly the portion thereof which has been quoted, in that said consumers maintain that they cannot lawfully be required to pay for water service for lands not to be irrigated, notwithstanding the terms of said contract, and the said decision, and so determined, and inasmuch as the Honorable Commissioner presiding at this hearing has expressed a desire that the matter of interpretation of said decision be referred to the entire Commission upon the presentation now to be made on behalf of all consumers represented herein by me, save and except those, if any there be, who may hereafter be advised that they have legal rights under said contracts, I do now formally move the Commission, first, that the Commission declare in terms not susceptible of misinterpretation, whether or not, under pre-existing contracts, or otherwise, the Sutter-Butte Canal Company may exact advance payments, or any payments for water service under existing rates, based upon flat rates applied to acreage not irrigated, and not to be irrigated, and, secondly, to make its order continuing the date on or before which applications and advance payments may be made, from the 15th day of January, 1922, to a date at least ten days subsequent to the action of the Commission upon the single issue presented by the first ground of motion.

In support of the motion, and particularly the second part of it, asking for a continuance of the date for notices to be filed, or rather, applications to be filed, if I am right in the view that I take of the decision of 1918, and of the law underlying it, it is in consonance with fairness that these consumers, who, I believe, cannot be charged with rates for acreage not irrigated, nor to be irrigated, that they should have definite information from the Commission before being compelled to pay those rates. I cannot see that the water company can be seriously inconvenienced by a reasonable delay in the time for making those applications, and that delay may be just as short at the Commission, in its overburdened condition

of work, can reach a conclusion as to what the Commission really meant when it rendered the decision in 1918.

[fol. 89] In regard to the first ground of the motion as to what the Commission really meant, we are in a position that lawyers are always in, and that courts are always in, when a question arises as to the interpretation of the language used in a judgment by the same court, and one of the prime rules for the interpretation of such language is a consideration of what must or ought to have been in the minds of the judges of that court when the particular language was used, because it will always be assumed that the judges of the court intended to do what was lawful, what was fair, and what was just.

I don't want to make a very long presentation, but it is necessary to sketch a little bit of the story of the development of this water.

It commenced with the appropriation, or attempted appropriation of an individual at the site of the present dam, and he immediately went out, attempting to sell water certificates from his appropriation to anyone who would buy, to the extent of ten or fifteen thousand acres. He was offering that for sale to anyone who might buy, that was the foundation of this water use. He was unable to sell, made a financial failure, and he assigned his claimed right to the water to a second individual, who, in turn, assigned to the predecessor of the present company, the Sutter Canal Company.

Mr. Brookman: May I interrupt you just a moment, Judge Brittain? I was going to ask you where those facts appear, and if you consider them in the record?

Mr. Brittain: I had just started to say where they appear. They appear in part, and I am stating briefly what appears in part, at least, from the statement of facts in the decision from which I have just quoted. It is a very lengthy decision, and if counsel will read the decision he will find the facts stated there somewhat more at length than I am endeavoring to state them. I am stating my recollection. I may be mistaken in some detail, but, in the main, it is in the decision of the Commission.

Mr. Brookman: That printed decision, and the record are in evidence.

Mr. Brittain: I don't understand that a decision of the Commission, that it is necessary to be introduced in evidence where we are dealing with the decision itself. However, I think we will get along better if I continue with the orderly presentation that I desire to make, and if I fail in my duty in making the presentation, of course, Mr. Brookman will have an opportunity of swatting me on both sides, but I think I will get further if I go right along without interruption, or an attempt to get into a discussion as to whether a decision of the Commission is evidence, or not. If I make any misstatement, I shall certainly welcome any correction of a misstatement of fact.

Going back, the assignee of the first appropriator made an assignment to the Sutter Canal Company, and it, in turn, attempted to sell, and did sell water certificates or shares in this appropriated water

to some 10,000 or 15,000, or the owners of some ten or fifteen thou-
[fol. 90] sand acres. The canvass that was made at that time to finance the first canal was widely advertised in the county—in these counties. There were public meetings held—I am not sure that these particular facts appear in the printed opinion, but they appear in various public documents, if there is any doubt in regard to the facts then they may be disregarded—there was almost a house to house canvass made of the people in the locality seeking to sell them and to any of them and to all of them these water rights.

In other words, and this is the only purpose of stating these facts—in other words, from the time of the first appropriation by the individual, to the time of the transfer of the so-called water rights from the Sutter Canal Company to the Sutter-Butte Canal Company, there was, at no time, any indication of an intention on the part of anybody who owned or claimed to own the water rights, any claim that they were privately owned for private use, but they were by these very facts of public offer to sell to anybody and to everybody at an equal rate——

Mrs. King (attorney for certain contract holding consumers who contended that as to her clients the Sutter-Butte Canal Company was not a Public Utility, and whose contentions in that regard have been determined adversely to her clients by both the Railroad Commission and the Supreme Court of California): We object to the statements of counsel for the reason that we have a pleading here which states the very opposite, and as a member of the Butte County Farm Center, I certainly object to counsel representing our clients in this matter.

Mr. Brittain: You wish to know whom I do not represent? I do not represent Mrs. King's clients, and you will kindly ask her for a list of them. I certainly don't want to represent Mrs. King's clients in any way.

There was, in my opinion, a complete dedication of this water to a public use. The purpose of making this statement is to differentiate this case from the case of the Lake Hemet Water Company and the Lake Hemet Land Company, with which the Commission is fully acquainted, and particularly the case of Allen vs. the Railroad Commission. In that case, which stands alone, a small group, five or six men owning some arid land in Los Angeles County, I believe, desired to sell the land. It was unusable and they organized a collateral water company so called, pumped water, which was never dedicated, in the first instance, to public use, but was privately owned and to be used solely on the land owned by the Lake Hemet Land Company. They sold the land with the water thus privately owned, and not dedicated to a public use, and, subsequently, having more water than they had used on the privately owned lands, they sold the excess water to other persons, and to any other persons who desired to buy, and, in the case of Allen vs. The Railroad Commission, without analyzing the case in detail, the Supreme Court held that, as to the contracts dealing with the privately owned water not then dedicated to a public use, the Railroad Commission had no power,

under the provisions of the State and the National Constitution to invalidate those contracts. The conditions there were exactly the opposite from the conditions here, where the water was dedicated to a public use from the very inception of the claimed water rights. [fol. 91] The Supreme Court has also dealt with that subject, and I refer particularly to the decision of the Supreme Court in the case of Limoneira Company vs. Railroad Commission, reported in 174 California, at page 232, the decision having been made on January 23rd, 1917, where the contention was made, that perhaps will be made here by Mrs. King on behalf of the clients that she represents, and which may be made, perhaps, on behalf of the Sutter-Butte Canal Company, we may agree with Mrs. King——

Mr. Brookman: Which we do not.

Mr. Brittain: That the Commission had no power to interfere in any way with the pre-existing contracts. The Supreme Court said the power to prescribe the rates at which water devoted to a public use shall be furnished, is, of course, a necessary incident to the power of regulation possessed by the State, for the purpose among others, of preventing discrimination between persons entitled to the benefit of the use, and to insure to such persons the furnishing of the water to which they may be entitled upon fair and reasonable terms. It is a continuing power that may be exercised at any time, and, regardless of any attempted contract existing between the public utility and the consumer. We are speaking, of course, said the Court, with reference to appropriations of water and contracts made since 1879. The present appropriation was made since that time.

"For the exigencies of this case require no consideration of alleged rights of an earlier date. Any such contract, although not in violation of any existing law or regulation when made, was necessarily, made subject to this continuing power of the State to so affect it, just as much as if the contract had contained a provision expressly making it so subject."

Of course, it is fundamental that every contract has incorporated in it the whole body of the law. For instance, at the present time, Mr. Brookman and I, for instance, would, neither of us use liquor, we, both of us, believe in the prohibition, I assume, and might make a contract with each other in perfect good faith, one to buy and the other to sell 100 barrels of bootleg whiskey at a price. One might induce the other to pay half of that price, but the contract, because it would not be legal under the present prohibition laws, would not have any binding effect and the man who did not get the bootleg whiskey could maintain no action on the contract because it would have no validity, nor could he sue to recover anything which he had voluntarily paid to the other man on that invalid contract. The courts would leave the parties just where they had placed themselves, because of the fundamental principle that the whole body of the law is written into every contract.

Another illustration: the great body of state statutes as to contracts between shippers and railroads, prior to the exercise by Con-

gress of its constitutional power to control commerce between the states. Among the several states, until the Federal Government [fol. 92] reached out and exerted that power, which it had held from 1789, when the Constitution was adopted, any contract—any statute passed by any of the states, any contract between the parties was perfectly valid, suit might have been maintained on it, as it might have been maintained on these contracts in question here, up to the time that the government authority exerted the power which the Constitution gave it.

In the case in 174 California, from which I have just read, the Supreme Court lays down that rule in rather more concise language than I have used, and it laid down—made the positive statement that since 1879 the state possessed the power to control the rates and the terms upon which publicly dedicated water may be served to the consumer, and that must be served on equitable rates. The Commission, itself, has so frequently announced that rule that I assume there is no question in regard to the efficacy of that rule unless the water itself was held in private ownership, as distinguished from publicly dedicated water, as in the Lake Hemet case.

The decision in Case number—Decision No. 5227, the Commission was discussing these very contracts, and it gave the history of the development, it spoke of the public meetings and the newspaper advertising on pages 4 and 5, and reached the conclusions, and I think unquestionably the right conclusion, that this water was publicly dedicated water from the first location by Mr. Fleming, and in discussing these things it must be presumed that the Commission knew the law, and that the Commission knew of the decision of the Supreme Court in the case in which the Commission itself was a party in the decision rendered just about a year before this opinion was written, and the Commission must have known what the Supreme Court had ruled in regard to the law of such contracts.

Then the Commission further quoted from the decision of the Commission written by Commissioner Thelen six months after the decision of the Supreme Court and six or seven months before this decision, and they used Mr. Thelen's language as to the rule on which the Commission was then acting, and Mr. Thelen said that the Commission has power and has jurisdiction to establish a rate to be paid for water sold, but not a rate to be paid by a person who does not desire to purchase water, or to be placed in the status of a customer of a public utility water company, with the right to call for any supply of water that he might want, and it stated that the Commission cannot permit this discrimination of these contracts to continue, that the rates established must be uniform and non-discriminatory in their application, and, further, this very significant statement is made, which, to my mind, leaves absolutely no doubt as to what was really in the mind of the Commission, as the rules of interpretation of such a document would indicate that it must have been in the mind of the Commission:

"The revenue of this company will be materially reduced by the elimination of the area which has heretofore been paying an annual charge, but which has not used water for irrigation."

That language leaves in my mind, absolutely no doubt as to what was actually in the mind of the Commissioner who used it, the incor- [fol. 93] poration of that language in this opinion leaves no doubt in my mind as to the intention of the court, as to what interpretation would be placed on that language by any other court. I simply want to, if the Commission desires a more extended argument, desires further citations on this matter which goes directly to the power of the Commission, I will be glad to submit them.

There is one other feature that I have not mentioned, I don't want to enlarge upon that, but I want to call the Commission's attention to it in this connection. It has been suggested that the Commission, under the rules of law which I have stated, might change the rate per acre under its power to fix rates, and leave these contracts, otherwise, untouched. The Commission has absolutely no such power. I hold one of the contracts in my hand, a contract bearing date of June 24th, 1904, covering 625 acres issued by the Butte Canal Company to Mr. George W. Thresher and Mr. P. B. Thresher.

"Witnesseth that for and in consideration of the mutual covenants and considerations herein set forth, the parties mutually agree that the canal company"—I am cutting out the formal language—"that the canal company agrees to furnish the Threshers from its system of canals to be constructed all the water that may be required, not to exceed the rate of one cubic foot per second for each 160 acres, for the purpose of irrigating the following lands, to-wit:" * * *

describing 625 acres, from the time of the completion and delivery of water in the main canal of said system, and so on, and the party of the first part, that is, the canal company, builds a suitable gate in the bank, and then the Threshers, the water users, are required to construct a ditch from the gate, at their own risk, to maintain and keep the same in repair, and to do many other onerous things, which no farmer, no owner of land would have considered, including giving the canal company a right of way over his lands, which nobody would have considered doing, but for the benefit of the low rate at which water was to be delivered. The rate was fixed first at $1.50 an acre for eleven years, and then $1.00 an acre forever after, until "Kingdom come!" There is absolutely no limitation to these contracts other than that. For all time.

Now, the contract is onerous upon the owner in many respects, the only inducing thing was that he should have water at $1.00 per acre for eleven years, and $1.50 per acre after that time, and the particular contract was, very shortly after it was made, reduced, according to my recollection, from $1.50 an acre to $1.00 an acre. I may be mistaken; that was done in some cases. The only inducing thing there was the law rate. If that rate is increased, and may again and again and again be increased, whenever this company opens out a new series of ditches, to meet its excess demands for operation and maintenance and return, then this contract is denuded of its consideration. The Railroad Commission certainly has no power to make a new bargain for these people. It may say to the

water company, "You may deliver water at such a rate." It may say to Mr. Thresher, "If you get water you must pay such a rate," [fol. 94] but it has not any power to make a bargain which Mr. Thresher never entered into, and which the water company never entered into. The contract is non-severable, the consideration for it cannot be separated from the onerous conditions laid on Mr. Thresher. All the other contracts contain the same conditions. The Commission is absolutely without power, the Supreme Court of the United States is without power, and has frequently said it is without power, as our own Supreme Court has said, where a contract is non-severable, to make a new contract which the parties themselves never entered into.

If the Commission desires citations of authorities on the matters, the law that I have tried to sketch hurriedly, if it desires further argument, if it desires the presentation in briefs, I would be glad to present that, and I do that in view of the statements which I have made, I am not throwing bouquets at myself, I think in view of the law, I do think in view of the law that we ought to have an early and a very clear determination on the part of the Commission as to what it really did mean when it rendered the decision in 1918, that these people here should not be, at their peril, be compelled to pay money which the Commission, I think, said they should not be required to pay, and I think that they should be given sufficient time before making their applications for 1922, to enable the Commission to make up its mind what the Commission meant when it used this language in 1918.

Mr. Noble: (one of the hydraulic engineers of the Railroad Commission of California): I would like to ask, regarding that contract that you have quoted, whether that consumer was taking water the last year, as a consumer—taking water from the system?

Mr. Brittain: Mr. Thresher, were you taking water last year under this contract?

Mr. Thresher (one of the plaintiffs in error): Yes, water was taken under this contract.

Mr. Noble: I would also like to ask what rate he paid to the company last year.

Mr. Thresher: Paid $2.00.

Mr. Noble: Was that a different rate from what was mentioned in the contract, your original contract?

Mr. Thresher: Oh, yes.

Mr. Noble: It is a matter of fact, isn't it, that that rate was fixed in the prior decision, I believe 5227 of this Commission, rendered some time in 1918, and that for three years past you have acquiesced in an alteration of that contract, in the rate to that extent, of the company, at any rate, and without protest of record, isn't that the fact?

Mr. Brittain: Just a minute, before you answer that question, Mr. Thresher. I have no objection to Mr. Thresher answering the question, but before he answers I desire to make one thing clear to the [fol. 95] Commission, which I thank you for calling to my attention. There are questions in regard to waiver of what are assumed to be

contractual rights from time to time, but that question of waiver has absolutely nothing to do with the presentation which I have made. The only place that that could apply in any way would be on the part of—if I might use Mrs. King's client without objection—would be on the part of a client in the position of one of Mrs. King's clients, who was claiming that the contract was effective, and fully effective, then the question of whether that particular man had waived any rights that he had, might denude him of his rights to rely on what he might believe to be his constitutional rights, but on the presentation that I am making that these contracts have been entirely superseded by the action of the Railroad Commission, it is absolutely immaterial whether the rate was the same as fixed in the contract, whether there has been any acquiescence in the decision of the Commission, that the contracts have no further life.

The Commission itself in that decision exerted the power that the Constitution gave to the state, and having exerted the power, our whole contention is that the contracts are entirely superseded, therefore, there can be no question of waiver on the part of Mr. Thresher. I took up this contract from a large number, Mr. Noble, there are other contracts where the rate was the same, *where the rate was the same*, where the only difference made in the ruling of 1918 was in a direction to pay twice a year instead of once a year fixed by the contracts, but on behalf of the people who say that these contracts have no further force, the question of waiver hasn't any bearing.

Mr. Noble: Wasn't it a matter of fact that this order prescribed three rates, and those were the only rates that the company during the past three years have collected under?

Mr. Brittain: No, that is not the fact.

Mr. Noble: Do you know that the company has collected any other rates besides those which are the rates filed with the Commission as the rates of the company?

Mr. Brittain: I am quite sure of it. I will put a witness on the stand, if he is here, to answer that question.

Is Mr. Nealey here?

F. S. Nealey, a witness called on behalf of protestants, being first duly sworn, testified as follows:

Direct examination:

Mr. Brittain:

Q. Where do you live, Mr. Nealey?

A. I live three miles south of town.

Q. You own land there?

A. I own 160 acres.

[fol. 96] Q. Have you been—did you have originally a contract with the Sutter-Butte Canal Company?

A. I had a contract with the Sutter-Butte Canal Company.

Q. At what price?

A. At $1.50 at the canal.

Q. And that was prior to 1918 in date?

A. It was.

Q. And you have been irrigating since that time? How much land since 1918?

A. I think about 85 acres, one year with another. Some years less, some a little more.

Q. You are a member of a local mutual water company aren't you?

A. I am.

Q. That company was organized to take over the number 1 lateral of the Sutter-Butte Canal Company, was it not?

A. It was.

Mr. Brookman: I object to that. There is no evidence that that lateral belonged to the Sutter-Butte Canal Company. I think we can definitely establish that it does not, and never has. We can also establish that this gentleman has never had a contract with the Sutter-Butte Canal Company.

A. I have a contract with the Sutter-Butte Canal Company.

Mr. Brittan: Don't argue with the counsel, if you please.

Mr. Brookman: The Sutter-Butte Canal Company, or the Butte County Canal Company?

Commissioner Martin: Just a moment, gentlemen. Read the question, Mr. Reporter.

(The reporter reads the last question.)

Mr. Brittan: That last answer, in view of the interruption of Mr. Brookman, I assume is based on your general information? You have never examined the title of the Sutter-Butte Canal Company to the number 1 lateral, have you?

A. I never have.

Q. No. You are a member of the board of directors of the mutual company, aren't you?

A. I am one of the five directors.

Q. The existing rates under the schedule of 1918 call for a flat rate of $2.00 delivered to the Mutual Water Company's district?

A. At the canal.

Q. And you accept that water, get that water through some understanding between the Mutual Water Company and the Sutter-Butte [fol. 97] Canal Company as to the delivery of the amount of water in accordance with the original contract, that is true, isn't it?

A. Yes, sir.

Q. Do you know whether all the users of water on that number 1 lateral within the control of the Mutual Water Company, of which you speak, are paying under the present schedule, $2.00 per acre?

A. They are all paying $2.00 that I know of.

Q. To the Sutter-Butte Canal Company?

A. To the Sutter-Butte Canal Company.

Q. In addition to your charge of the Mutual Water Company?

Do you pay those bills direct to the Sutter-Butte Canal Company? Or do you pay the Mutual and then it pays to the Sutter-Butte Canal Company?

A. Our checks are paid direct to the Sutter-Butte Canal Company, the $2.00 an acre.

Q. And have you been paying since 1918 on your whole 160 acres, or on the 80 or 85 acres that you irrigate?

A. I have paid it on the whole 160.

Q. Has that been demanded by the Sutter-Butte Canal Company?

A. Their bills have been for the whole thing.

Q. They are billing it to you for the whole 160? Have you told them you were only using water on 80 or 85 acres?

A. I have.

Q. You have protested against that charge to them?

A. To the extent I have told them I have not used that amount, but my contract was with the Sutter-Butte Canal Company, and I had a letter of the '18 decision from the Railroad Commission; I wrote them, asking after the decision, about the payments.

Q. Just a moment. Have you that letter with you?

A. No, I haven't. I kept it for two years.

Mr. Brittain: Wait just a minute, Mr. Nealey. I would like to ask whether you have a copy of the letter that was written to Mr. Nealey, or not.

Mr. Noble: No. That might be informal, those informal letters are not always put in the file with the case.

Mr. Brittain:

Q. About when did the Railroad Commission write to you, Mr. Nealey?

[fol. 98] A. It was some time in approximately '18, after the decision.

Mr. Noble: No, that is not with this file.

Mr. Brittain: Very well. You may state what your recollection is of that letter—never mind what the letter contained. No further questions of Mr. Nealey.

Mr. Noble: I don't think it was clearly put that Mr. Nealey had paid a different rate from what was set out in those three schedules. He says he paid the $2.00 rate, as I understood from his testimony, and he complied with one of the rates set out, one of the forms set out.

Mr. Brittain: That is exactly the thing he did not do. I have failed completely in what I have been trying to make clear to Mr. Noble, at any rate, exactly what the basis of my contention is, that it is manifestly contrary to the rate, manifestly contrary to the rule of the decision as set forth in this decision, to require a man who is irrigating 80 acres of land to pay $2.00 an acre for 160 acres of land; in that event he is paying not $2.00 per acre for the land, which is irrigated, that this Commission said he must pay, but he is paying $4.00 an acre for the land which is irrigated; he is pay-

ing $2.00 an acre for 80 acres of land, which does not get one drop of water, and never did get a drop of water, and he never wanted to have — get a drop of water, and that is flatly contrary to this decision, it is just double the rate set up in the schedule.

Mr. Noble: In addition to that, he is paying two dollars, that is contrary to his contract, which provided for a $1.50 rate, that is altered, that is different from your contract, is that right?

A. Sure.

Q. Your contract called for $1.50, that is what I wanted to bring out here, that this decision, under this decision that for three years the witness has been paying a $2.00 rate when his contract called for a $1.00 rate, and, in addition to that, he has testified that he has paid for land that he did not irrigate, that is, he only irrigated approximately half of his acreage of 160 acres, and he paid for the whole acreage. That is what I wanted to bring out.

Mr. Brittain: That is the evidence, yes. That is all, Mr. Nealey.

Commissioner Martin: Any questions of the witness?

Mr. Brookman: No.

Commissioner Martin: That is all, Mr. Nealey.

Mr. Brittain: That is all. Did you have any other question, Mr. Noble, that you wanted to ask me?

Mr. Noble: That is all.

[fol. 99] Mr. Brittain: We would like to have the Commission advise us in regard to the motion, particularly continuing the date when these applications should be made, at the very earliest possible minute, so that these men may be protected.

Mr. Noble: There is one other statement. Is it not a fact that as regards all these prior contracts, the same condition exists as has been stated by this witness?

Mr. Brittain: Substantially, as I understand. There are differences in acreage, but, without attempting—this is hearsay of the worst sort, and not to be taken as evidence—my information is this: that whether they were the $1.00 contracts, or the $2.00 contracts, or the $1.50 contracts, the Sutter-Butte Canal Company has demanded, in every instance, payment at the rate of $2.00 an acre for the entire acreage, although in some instances there have been very serious protests, I am informed, against that demand.

Further, that under the terms of these contracts—and this is another matter that I did not mention that should be considered by the Commission: under the terms of these contracts, the water company had, before the state exercised its power of control, the right to impose a lien upon the property of the farmer, in the event he did not pay the $2.00 or the $1.50, or the $1.00 an acre for the entire body of land. The contracts are recorded, and each one constitutes a cloud on the title of every one of these farmers. If one of these men, relying on his right, should tender to this company $2.00 an acre for the 80 acres that he owns, and the company should refuse to take it, the company could immediately attach a lien for that year to his land, and deprive him of the right to sell or mortgage his land until that $2.00 an acre for the entire body of land

should be paid. That is one of the onerous conditions of the contract which the farmer, when he entered into the contract, was willing to assume at a $1.00 or $1.50 rate, but which the farmers as a whole cannot afford to assume today, when they recognize that the Commission has the power to make a $2.00, or, as is asked here, higher than a $2.00 rate, and it indicates very clearly, that the Commission cannot make for these people a new contract, whereby they will be required to pay something they never agreed to pay, and still to be bound by an extraordinary power in the public utility to enforce the payment of its bills, such as no other public utility in the State of California possesses, and such as the Commission itself, unless I am greatly mistaken, has denounced.

Mr. Brookman: There is one question which I want to put to Judge Brittain so that I can understand clearly what his view is as to what the company may do, the position which, in his opinion, the Company may take, and should take, as to whether or not all of the rights evidenced by these contracts have been forfeited.

As he has outlined the history of this irrigation system from the previous decision of the Commission, we agreed that from the beginning this was a public utility system and that all the water appropriated has been dedicated to public use. That statement was also made by the Supreme Court in the decision from which I now want to quote. That decision is Butte County Water Users' Associa-[fol. 100] tion against the Railroad Commission, decided on February 28th, 1921, reported in Volume 61 of the California Decisions, at page 316. The Supreme Court in that case reviews, in part, the history of this canal system and points out that in the beginning a number of contracts were made, the contracts which are referred to here, that the plan of making these contracts was that the company could make these contracts up to an aggregate amount of 1,000 second feet of water at the rate of one second foot for each quarter section of 160 acres, and the Supreme Court points out that after the company has made these contracts, up to that 1,000 second feet, that that amount of water is dedicated to that land, and that the company cannot take the water away from that land and put it somewhere else, by virtue of these contracts; that is that there is a very definite appurtenant water right made by these contracts, a valuable water right attached to the land under these contracts, which is of value and which gives a prior claim to subsequent water elsewhere beyond the 1,000 second feet. May I quote briefly from page 328? This is from the language of Chief Justice Shaw:

"The reservation by the aforesaid contracts, giving the company the right to make like contracts for supplying at least 1,000 second feet of water and to compel the landowners to pro-rate the water when less than that quantity was available, shows that the original proposal of the company was that the company would devote a water supply amounting to 1,000 second feet, constant flow, to all landowners who applied for water for irrigation of their lands, under such contracts, until the water so contracted for amounted to that quantity, that the water used should not exceed the "rate of three second foot"—the word here is "three", but, from the

previous paragraph it appears it is "one", and, in fact it is "one" from the contracts—"exceed the rate of one second foot for each quarter section of 160 acres, and that the particular land covered by this limited number of contracts should constitute the area, district or territory to which this particular 1,000 second feet of water should be dedicated. This was a dedication to a public use."

Quoting Traver vs. Railroad Commission, 60 California Decisions, at page 61:

"The contract did not prohibit the company from extending its canals into new territory and selling a part of the 1,000 second feet for use therein, or from furnishing at the rate of more than one second foot to each quarter section of land. The company could, therefore dispose of the entire proposed supply of 1,000 second feet at such places in such quantities as it pleased, without departing from the terms of the dedication and such disposition would not [fol. 101] constitute a new dedication of which any of such contract users could lawfully complain.

"I am of the opinion that if the company had thus disposed of this entire supply, it would have amounted to a dedication of that quantity of water to public use for irrigation exclusively upon the lands described in the several contracts, and that neither the company nor the Railroad Commission could enlarge the dedication, or expand the territory entitled thereto, so as to give to other lands an equal right to receive water out of that 1,000 second feet in common with the lands described in such contracts. The land so described would be entitled to preference in such use, and other lands could rightfully receive water only from the surplus remaining after the rightful user had taken the quantity they had respectively contracted for so far as it was required for beneficial uses on their lands."

Now, then, that is a definite pronouncement by the Supreme Court that in issuing contracts, as has been done in this case, that the water is definitely set aside for the area defined in the contracts, and that the Company—neither the Company nor the Railroad Commission, as long as those contracts continue in effect, can take that water off of these lands and supply it somewhere else.

Now then, the Company has saved for these landowners, and they have a right to insist, unless Judge Brittain's view is correct, that the company save this water for use upon their lands. If those contracts are forfeited, and if Judge Brittain's conclusion is correct, that by virtue of the Commission raising the rate, those contracts no longer exist, that the water rights created by the contracts, and made appurtenant to the land are forfeited, and that those who these contracts can no longer claim water from the company under the contracts, then, of course, the company can take this water and use it elsewhere.

As long as the contracts continue in effect we are bound to save that water for this land, and the consumers and contract holders are bound to pay the rates provided in the contracts, or the increased

rates provided in the Commission's order. But if the contracts are forfeited, we then have the right to take that water and put it elsewhere.

Now, I think that presents a very important question, as Judge Brittain has suggested. If the contracts are gone, if the water rights are forfeited, if those who hold these contracts are no longer taking advantage of the rights and preferences which they have under this decision of the Supreme Court, which, of course, must follow, if the contracts fall, why then we are in a position to take this water and use it elsewhere, and I think that should be borne in mind in determining just what it is best to do, and just what the law contemplates. We have taken the view that as long as the contracts continue in effect we must save this water for the land the water is appurtenant to, and shortly it may appear very much more valuable to the land than it has heretofore. The land without the water will certainly [fol. 102] not have the value of the land with the water. Now, these water rights represented by these contracts, if they are not now recognized as being valuable, very conceivably in the near future may be regarded as having great value.

Now the answer to Judge Brittain's question will also answer our question, which is this: that if the contracts are to fall, and if the Commission's order increasing the rates nullifies those contracts, so that they no longer exist, which, of course, means that we don't collect the rates, and that the water rights existing thereunder are forfeited, why then we, of course, will be in a position to use this water elsewhere, which, so far, we have saved for the particular lands covered by the contracts. I merely want to mention that point, which could be considered in determining what the attitude should be.

Mr. Brittain: Mr. Brookman asked me a question. May I answer that just a monent?

Mr. Brookman: Yes.

Mr. Brittain: It does not seem to me that there is any real difference between this decision and what I have said. Mr. Brookman's question does not really present any problem.

I have not contended for one minute, and shall not contend for one minute that the action of the Railroad Commission has invalidated or nullified anything which has been done in the past. I have simply said, and this is all the law says, that when the State reached out and fixed rates under its admitted power to do so, it superseded, as to all future acts, those contracts in the dealings between the Company and the consumer.

It is a great deal like the illustration of the bootleg whiskey. When the Sutter-Butte Canal Company,—the Sutter Canal Company, the predecessor of the present company, was out trying to get enough money to build its first canal, and get that money it made promises to these people in view of the existing provisions of the Constitution, and if they then got the advance payment of five dollars an acre, or ten dollars an acre, or fifteen dollars an acre, and if the other provisions of the contract made in view of the power

of the State, and it formally dedicated a particular amount of water, preferentially, as Judge Shaw says, to the particular land, that is the thing which is beyond the power of the Commission, or of any other tribunal to change. If these people paid to the canal company, prior to the action of the State on controlling rates, and preceding the contracts, anything, if they either suffer anything, or gain anything, those things remain; they were a part of the consideration for all the dealings, up to the time, the perfectly valid dealings, like any other perfectly valid contracts which could not be nullified, but which are superseded at the time the State exerted its power, sovereign power, to control these rates for future dealings, and there is absolutely no difficulty in reading this decision, with that view of the law.

Mr. Chief Justice Shaw says that the water company did, prior to the exercise of the power, by the State, it did dedicate this amount [fol. 103] of water, publicly dedicated to this parcel of land so much water preferentially—"preferentially"—the word is Judge Shaw's, itself. The Company under its rules requires each year the water users to file an application stating how much water he wants; he may have the preferential right, if he owns 160 acres, to 160 acres of water, over the right of some entire stranger, some newcomer, some outsider, and he has the preferential right to take the whole 160 acres, and if he takes the 160 acres, he must pay whatever rate the Railroad Commission fixes for the use, but he also has the right, under the rule of the Commission, and as a matter of common fairness and dealing among these people, to pay the Railroad Commission's rate to this water company for the amount of water which the company knows, by the first of the year they will have to deliver to him under his preferential right, but there is absolutely not one word in that decision which indicates that they may take from him the whole 160 acres. There is not one word in anything, I will state, that would suggest a nullification of these contracts. I have merely said that the contracts were absolutely valid up to the time the sovereign power of the state was exerted; when it was exerted the contracts were simply superseded, that is all there is to it; there is nothing to it." (Repts. Tr. pp. 231-260.)

During the hearings in said proceeding no ruling was made on the foregoing matters, ruling being reserved by the presiding Commissioner until the decision of the Railroad Commission of the entire proceeding, which said decision is numbered 10372 made by said Railroad Commission on the 26th day of April, 1922, and copy whereof is appended to the Petition for Writ of Review addressed by plaintiffs in Error to the Supreme Court of the State of California, referred to therein and marked Exhibit "A" and as such certified by the Clerk of the Supreme Court of the State of California under the second paragraph of the Joint Praecipe and Stipulation in this case.

[fol. 104] The foregoing statement is in accordance with the Stipulation concerning the record of proceedings before the Railroad Commission of the State of California at the head of this docu-

ment and for all purposes of the Writ of Error in the Supreme Court of the United States in this case the said statement is full, true and correct.

Dated this 5th day of May, 1924.

T. S. Brittain, Attorney and Solicitor for Plaintiffs in Error. Hugh Gordon, Carl I. Wheat, Attorneys and Solicitors for Defendant in Error The Railroad Commission of California. Devlin & Brookman, Isaac Frohman, Attorneys and Solicitors for Defendants in Error Sutter-Butte Canal Company (a corporation).

[fol. 105] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

OPINION

Application for certiorari to review an order of the Railroad Commission of California regulating water rates. Order annulled.

For Petitioners: F. S. Brittain, T. C. Nelson.
For Respondent Railroad Commission: Hugh Gordon, William W. Clary.
For Respondent Sutter-Butte Canal Company: Devlin & Brookman, Henry Ingram.

By the COURT:

The petitioners herein seek by this proceeding to have reviewed and annulled a certain order and decision of the Railroad Commission, given and made on April 26, 1922, with relation to the water rates of the Sutter-Butte Canal Company, in so far as the said order and decision of said Commission affects and undertakes to regulate certain water rates payable by said petitioners as customers of said Canal Company in alleged violation of law. The individual petitioners herein, and also those persons who constitute the membership of the several associations who are named as petitioners herein, are landowners in the region supplied with water for irrigation purposes by the Canal Company, and as such landowners, are either directly or through their predecessors in interest, the holders of contracts with such Canal Company or its predecessors, for the furnishing of water upon their respective parcels of land. These contracts [fol. 106] were entered into at various times by the parties thereto prior to the year 1913. They differ somewhat as to the charge per acre for water and also in some instances as to the amount of the initial charge required by the water company at the time of making said contracts; but in other respects they are substantially the same.

The water rights contracted for were to be appurtenant to each parcel of land and might not be sold except with the land. The contractual rate per acre was to be computed upon the entire acreage of the individual tract to which the water right was made appurtenant, whether or not the land was all irrigated or susceptible of irrigation. The consumer was to construct lateral ditches for delivery and the water company was given rights of way over the consumer's land and was also given a lien upon the consumer's entire tract of land for defaulted payments for water. The contract parties operated under these contracts without discord or difficulty for several years, during which period the water company largely extended its irrigation system so as to include among its consumers many persons who were not contract holders, but were merely consumers of water furnished by the said water company in its capacity as a public utility to the public at large. That the said Sutter-Butte Canal Company was from its inception a public utility supplying water for irrigation to an increasing area of the region that its predecessors originally invaded, is conceded by the petitioners, has been so regarded and held by the Commission, and has been so decided by this court. (Butte County Water Users Assn. v. Railroad Commission, 185 Cal. 218). This much may, therefore, be regarded as an established fact and condition so far as the instant proceeding is concerned. In the year 1917, the Railroad Commission, upon application of the Canal Company, undertook to investigate, establish and fix general water rates for said Canal Company affecting all of the consumers of its water for irrigation, whether contract or non-contract users of said water. All of the parties hereto were parties to that proceeding. The Commission, by its order therein, made on the 25th day of March, 1918, fixed rates per acre for water [fol. 107] affecting all such consumers, and in its decision so doing, provided that the water served thereunder might be charged for at the acreage rate or might be measured by meter and charged for that way. With that portion of said order which deals with meterage rates we are not concerned in this proceeding, but in that portion of said order which dealt with acreage rates the Commission divided the consumers of the Canal Company into two classes, those who held contracts and those who did not. The annual rate for contract holders was made somewhat lower than that for non-contract holders. The reason for this differentiation was explained by the Commission in its said order as being that since a large portion of the contract holders had paid initial charges in varying amounts per acre it would seem unfair that new customers who had not made a similar advance should receive service at the same cost as those who had made such payment. With respect to the provision in said contracts that the holders thereof should pay water rates according to the acreage of each individual tract, whether the same was irrigated or not, the Commission undertook to make no order or ruling which would have the effect of abrogating said contracts in that regard. The effect of said order of the Railroad Commission as to such contract holders, as the same was interpreted and put in operation by the Canal Com-

pany, was that while their annual payment of water rates per acre thereof increased over the amount provided in their said contracts was lower than that to be paid by non-contract customers, the contract holders were required to pay such lower rate upon the basis of the entire acreage of their respective holdings, while the non-contract customers were to pay the higher rate upon that portion of their holdings which was actually under irrigation in each particular year. The foregoing order of the Commission went into effect shortly after the date of its entry on April 6, 1918, and its rates were thereafter charged and collected by the water company as to all of its customers during the succeeding three years or over and up to the time when the subsequent order of the Commission, now under [fol. 108] review, was made and put into effect. None of the contract water users of the Canal Company during that period took any proceedings looking to a review or annulment of said order by the courts, or otherwise attempted in any form to assert that any rights under the provisions of their contracts had been invaded by the Commission in making said order, with the exception that certain of these contract customers, upon the putting into effect of said order, protested against the Canal Company's interpretation of the same and offered to pay the company at the rate set forth in its said order as affecting them, for each year, according to the number of acres upon which each of said contract customers desired to use water for irrigation during that year, but the company at all times refused to accept said offer, but on the contrary, demanded and received payment of the rates so established upon the entire acreage of each of said contract holders, who thereupon submitted to and paid said water rates according to the acreage of their respective tracts of land as provided in their said contracts without further or other objection. On November 5, 1921, the Sutter-Butte Canal Company filed another application before the Railroad Commission asking for a general increase in its water rates. The Commission proceeded, after notice to the water users of said Canal Company, in accordance with its rules and after appearances by many of such water users, individually or through their several associations, including the petitioners herein, to conduct through public hearings an investigation of the matters involved in said application, and in connection therewith, to consider the claims which the contract water users so appearing asserted and upon which they insist in the instant proceeding; and after such investigation the Commission proceeded, on April 26, 1922, to make its decision and order authorizing a further increase in rates for water service by said Canal Company affecting all its consumers of water. In so doing the Commission took express cognizance of the contention of these contract water users that its previous order, as interpreted by the Canal Company, did, and that its present order would, operate to work an unjust [fol. 109] discrimination between contract and non-contract water users by compelling the former to pay an increased acreage rate for the entire acreage of their respective tracks of land covered by said contracts whether the whole or any portion thereof was irrigated

or not. In dealing with said contention the Railroad Commission expressly held that the interpretation placed by the Canal Company upon its said former order was correct and in substance held that with the exception of its admitted power over the regulation of the water rates of said public utility, it had no power to abrogate or interfere with the obligations of said contracts. It accordingly, in its decision and order, made a general increase in the water rates of the Canal Company, substantially in the form of its previous order, but with the express ruling that as to the acreage of contract holders to be affected by such increase the provisions of their contracts should remain in full force and effect. The petitioners herein filed an application for rehearing before the Commission, which was denied, whereupon they instituted the present proceeding to annul said last-named order in the respect above indicated. The reply which the respondents make to their said application brings before this court the proceedings had before the Commission upon both of its said orders, the record in the proceeding resulting in its order of April 26, 1918, having been made a portion of the record in the proceeding before the Commission sought to be reviewed herein.

The petitioners herein do not contend that the Sutter-Butte Canal Company and its predecessors through whom they claim to have received their water rights contracts had not taken on the character of a public utility from a period antedating their said contract, nor do they deny that their contract rights thereunder were not at all times subject to control and regulation by the state, under the provision of the Constitution declaring that "the use of all water now appropriated or that may hereafter be appropriated for sale, rental or distribution is hereby declared to be a public use and subject to the regulation and control of the state in the manner provided by [fol. 110] law." (Const. art. XVI, sec. 1.) They do, however, insist that their said water rights contracts were at the time of their creation, and at all times thereafter, valid and subsisting obligations, one of the main considerations for the making of which was the water rate which each of said contract holders was to pay thereunder, and that while these contract holders conceded that the Railroad Commission had been invested by the state with power of regulating and establishing rates for public utilities, it had no power in so doing to create another and different contract between said public utility and its contract water users; and they further contend that the Commission has no jurisdiction under or by virtue of its conceded power to regulate rates or authorize or establish rates which would be unequal and discriminatory as between the contract or non-contract water users of the said public utility whose areas of the land subjected to irrigation are the same.

As to the first of these contentions, it must be admitted by the petitioners herein as a necessary corollary to their concession to the effect that the Canal Company was at all times prior to and during the existence of their contracts a public utility, that the full authority invested in the state by the Constitution and by it reposed in the Railroad Commission to regulate rates, carried with it the power

to change said contracts in so far as the proper exercise of the jurisdiction of the rate-making body might require such change. The contracts thus affected would be neither abrogated nor superseded as to the provisions thereof unaffected by such changes in their provisions as were necessary in the course of such rate regulation. The contracts of these petitioners as to some of these provisions have obviously not been abrogated by the orders of the Commission thus far made; as, for example, the provision therein that the water rights thus conveyed are appurtenant to and run with the land. (1) The only virtue in this contention of the petitioners springs from its relation to their second contention, which is, that [fol. 111] the Railroad Commision in the exercise of its jurisdiction over said contracts for the purpose of rate regulation has no power to create or continue discriminations as to rates between the consumers of water of the Canal Company in respect to the acreage basis upon which such rates should be calculated. This presents the only serious question in this proceeding. The Railroad Commission, by its orders made in 1918 and 1922, regulating generally the rates of the Canal Company as to its customers, has undertaken to keep alive the provisions in the contracts of these petitioners which provide that their water rates shall be calculated upon the areas respectively of their land, as described in said contracts, regardless of the acreage thereof, actually subjected to irrigation from year to year. As to the non-contract users of said water the rates provided for in each of said orders is to be calculated upon the acreage of their respective holdings of land actually subjected to irrigation during each year. The effect of these orders is not only to continue in being whatever discriminations had arisen between the contract and non-contract users of the water of said Canal Company, but also to increase the ratio of these discriminations with the additional increase in rates effected by said later order. It may not be denied at this period in the history of water rate regulation in this state that one of the primary objects of public control and regulation of water rates is the elimination and prevention of discriminations in rates as between the consumers of the water of the public utilities engaged in its distribution. In the case of Leavitt v. Lassen Irrigation Company, 157 Cal. 82, it was said by this court: "The fundamental and all important proposition then in this, that a public service water company which is appropriating water under the constitution of 1879, for purposes of rental, distribution, and sale, cannot confer upon a consumer any preferential right to the use of any part of its water." In that case this court fully reviewed and differentiated the decisions which had preceded it, and touching the extent of the power of public service corporations dispensing water to enter into contracts with particular water users touching [fol. 112] the extent and limitations of the rights which might be acquired under such contracts but which would be subject to public regulation and control. In the recent case of Limoneira Co. v. Railroad Commission, 174 Cal. 232, this court referred approvingly to the case last above cited, saying:

"The power to prescribe the rates at which water devoted to public use shall be furnished is, of course, a necessary incident of the power of regulation possessed by the state, for the purpose, among others, of preventing discrimination between persons entitled to the benefit of the use, and insuring to such persons the furnishing of the water to which they may be entitled upon fair and reasonable terms. It is a continuing power that may be exercised at any time, regardless of any attempted contract existing between the public utility and a consumer. We are speaking, of course, with reference to appropriation of water and contracts made since 1879, for the exigencies of this case require no consideration of alleged rights of an earlier date. Any such contract, although not in violation of any existing law or regulation when made, was necessarily made subject to this continuing power of the state to so affect it, just as much so as if the contract had contained a provision expressly making it so subject. No preferential right as to rates to be paid for the use of any part of the water devoted to public use can be so created by contract between the parties as to be immune from such regulation by the state. The effect of the provisions of our own constitution in this regard is so exhaustively and clearly stated in Leavitt v. Lassen Irr. Co., 157 Cal. 82 (29 L. R. A. (N. S.) 213, 106 Pac. 404), where our earlier decisions are reviewed, as to render further citation or discussion unnecessary. (See, also, Pinney & Boyle Co. v. Los Angeles Gas etc., 168 Cal. 12, 18 (Ann. Cas. 1915D, 471, L. R. A. 1915C, 282, 141 Pac. 620); Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291 (159 Pac. 865)."

(2) The effect of these decisions is not only to deny to the public [fol. 113] utility the right in contracts with certain of its consumers to create preferential discriminations in water rates, but is also to place a like limitation upon the powers of the rate-regulating agency of the state to either create or continue such preferences and discriminations between the consumers of the water of a public utility, equally situated, in so far as the service of water is concerned. These two propostions are the necessary complements of each other. What the public utility may not do in the way of creating preferential rates through contracts with favored consumers the rate-regulating body may neither countenance, create or continue by its orders in cases wherein its jurisdiction has been invoked or is attempted to be exercised in any general regulation of the rates of a public utility. Has this been done in the instant case? We are of the opinion that it has, and that the Railroad Commission, to the extent that it has been shown to have done so, has acted in violation of its duty and in excess of its powers. The order of the Railroad Commission made on March 25, 1918, though not expressly so stating, may be fairly interpreted as intending that the clause in the contract of the contract holders of the Canal Company, providing that the rates to be paid by them should be calculated upon the total acreage of their holdings, should remain in full force and effect and that their water rates as increased by said order should be thus calculated, regardless of the amount of their acreage irrigated or irrigable in

any particular year; while as to non-contract consumers of water as to said Canal Company the said order of the Commission provided for a rate to be paid by them based upon the amount of their acreage actually irrigated in any particular year. In the body of said order the Commission recognized the fact of this discrimination between these two classes of consumers and sought to justify and minimize such discrimination by the giving to the contract holders a somewhat lower acreage rate than that provided for non-contract consumers. The Commission justified this discrimination in favor of the contract holders upon the ground that as to this class of [fol. 114] consumers initial payments of various amounts had been made at the time of entering into their said contracts and that this fact would entitle them to have the sums thus paid taken into account in the readjustment of their rates with the result of allowing them a somewhat lower acreage rate than that provided for non-contract consumers. The Commission did not, however, in its said earlier order, attempt to modify the provisions of said contracts which required contract holders to pay water rates upon the basis of the acreages of their respective holdings as described in their said contracts. It thus kept alive and in fact intensified the discrimination thus originally existing between contract and non-contract users of water. The respondents herein seek to further justify this action on the part of the Commission upon the theory that under the terms of said original contracts the Canal Company was bound to maintain a reserve of water sufficient to irrigate the entire acreage of each of these contract holders if from time to time the same should be required, and hence was entitled to charge and collect a rate caluclated upon such acreage. The contracts in question do not contain any express stipulation to that effect, and if such agreement existed it arose impliedly out of the facts surrounding the making of said contracts such as that the Canal Company had at the time a difinite water supply which it proposed to those with whom it sought to contract to use upon a definite area of land embracing the tracts of these contract holders and which, therefore, impliedly it could not divert to other irrigable areas until the entire contractual rights of such contract holders to such water had been satisfied. The question of the existence of such implied condition attending the making of said contracts was presented to this court upon an almost identical record in the case of Butte County Water Users Assn. v. Railroad Commission, supra, wherein certain of the petitioners herein sought to have reviewed and annulled an order of the Railroad Commission permitting the Sutter-Butte Canal Company to serve with water a large additional acreage of non-contract con-[fol. 115] sumers, the claim of the petitioners in that proceeding being that said order was in violation of their contract right to have a sufficient amount of water of the Canal Company held in reserve to supply the entire acreage of their respective tracts of land with water as required. This court in that case refused to annul said order, on the ground, among others, that, assuming the existence of said implied agreement, there was no basis for a reasonable

anticipation that the water supply of the Canal Company would not be adequate for both its old and new customers. The concurring opinion of Mr. Justice Shaw in that case made this particularly clear in its recital of the facts touching the subject, as shown by the record in said proceeding, and in stating:

"These facts do not establish the exclusive dedication so claimed. They do not show the intent to confine the service of water to the first users alone, and they are entirely consistent with the existence of the intent on the part of the company to continue the extending of their system and the service of a part of their original supply to other users in other territory."

The concurring opinion further clarified the main opinion of the court by showing that the Canal Company had never, up to that time, used or been enabled to use in the supply of all its customers, old and new, an amount of water nearly approaching the quantum available under its original appropriation. In the absence of such showing this court held that the petitioners in that proceeding could not be heard to urge a condition which had not arisen and was not likely to arise, as a basis for their then contention. The facts shown to exist in that case and thus commented upon also appear in the record in the present proceeding showing that the Canal Company has never in fact held in reserve any portion of its original appropriation of water for such purpose since it has never been required to use, and never has used or been in a position to use, an amount of water approaching the volume of its supply from such source in order to furnish its customers with water sufficient to satisfy their rights and needs. The reverse side of that situation [fol. 116] is now presented upon a practically identical state of facts. The Canal Company and the Railroad Commission, as respondents herein, assert that by virtue of said clause in the contracts of the petitioners herein requiring the Canal Company to hold in reserve sufficient of the water of its original appropriation to supply the entire acreage of each of its contract holders it is entitled to receive and be allowed to charge a rate which shall be based upon the entire acreage of these contract holders, while as to non-contract consumers it is only to charge a rate based upon the acreage of this class of consumers actually subjected to irrigation during each year. The reasoning of the case of Water Users Assn. v. Railroad Commission, supra, applies to that precise situation. As the petitioners were not allowed in that proceeding to predicate their claim to preference upon a condition which was non-existent and unlikely to arise, for the same reason in this proceeding the respondents should not be permitted to predicate the right of the Canal Company to collect a discriminatory rate from its contract holders upon the same identical non-existent condition. In so far, therefore, as the Railroad Commission in its order of April 26, 1922, attempted to continue in force such discrimination, it was clearly acting in violation of the principle which forbids discrimination in rates on the part of public utilities serving this commodity to their users.

The order of the Commission of March 25, 1918, thus far commented upon and criticised, was not at the time, nor is it now, submitted to this tribunal for review, since the time for initiating such a proceeding has long since expired. The order of the Commission made on April 26, 1922, which is the subject of review in this proceeding, expressly sanctioned the method impliedly adopted in the order of 1918 as the basis for its differentiation in the rates therein provided for as between the contract and non-contract consumers of the Canal Company. It further expressly kept alive the provisions in said contracts requiring the rates of the contract [fol. 117] holders to be calculated upon the entire acreage of their respective tracts of land as described in their said contracts, regardless of the acreage thereof actually subjected to irrigation. As to non-contract consumers, it provided that their water rates should be calculated upon the amount of their respective holdings actually subjected to irrigation in each particular year. This later order of the Commission, by providing for a further increase in rates, thus obviously intensified the discriminations permitted in the former order. There was no showing before the Commission that the Canal Company was actually holding in reserve any water to meet such demands on the part of any contract holders for an additional service upon lands not theretofore subjected to irrigation, but, on the contrary, there was an affirmative showing that the Canal Company had recently made a very considerable increase in its sources of supply. In a word, the method which the Commission adopted in both of its said orders to eliminate past inequalities as between these two classes of the water users of the Canal Company was wrong in principle, since it not only perpetuated but tended to increase the very discrimination which it was its duty to destroy. We are satisfied that the orders of the Commission which thus perpetuated a discrimination between the contract and non-contract customers of this public utility, which had no basis in any actual difference in the status or rights of these two classes of consumers, is violative of the fundamental principle underlying state control of this form of such use. To what precise extent the order assailed in this proceeding injuriously affects the individual contract holders of the Canal Company, who in the main have appeared herein through associations whose membership has not been definitely set forth, we may not be able to ascertain, but that some degree of unjust discrimination has resulted from the operation and effect of this order seems clear. It is for the future guidance of the Commission in this and similar cases that we have been impelled to go thus fully into the discussion of the single question involved in [fol. 118] this proceeding. We are satisfied that an order of the Commission thus fundamentally wrong in principle and leading to these consequences should not be allowed to stand.

The respondents herein, however, contend that since the petitioners herein did not seek to review or otherwise question the validity of said earlier order, but submitted to the payment of the rates fixed therein, they cannot now be heard to question the method which the Commission adopted in fixing said rates when sought

to be reapplied by the Commission through the form of its later order assailed herein. It suffices to state that it does not adequately appear that the petitioners herein were so injuriously affected by the imposition and collection of the rates fixed in said earlier order as to have justified them in assailing it simply because a wrong principle had been adopted in the fixation of its rates. They cannot, therefor, be held to be concluded from their assault upon a later order in which the like wrong principle in rate fixing has been persisted in by the Commission to the extent of perpetuating a discrimination in rates which it is obvious would be increasingly unjust.

The order of the Commission of April 26, 1922, in so far as the same affects these petitioners, is annulled.

(Shaw, C. J., Lawlor, J., Wilbur, J., Lenon, and Waste, J., concur.)

[fol. 119] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

B

Agreed Summary of Respondents' Petition to Supreme Court of California for Rehearing on Opinion Dated January 8, 1923; of Petitioners' Opposition Thereto; of Petitioners' Memorandum of Authorities on Jurisdiction, and Respondents' Replies Thereto.

STIPULATION

It is hereby stipulated by the respective parties to this case on Writ of Error that the following is an agreed summary of the respective petitions, opposition, etc., mentioned in, and is that to which reference is made in paragraph 6 of the Joint Præcipe and Stipulation filed with the Clerk of the Supreme Court of the State of California with this summary:

PETITION OF SUTTER-BUTTE CANAL COMPANY FOR A REHEARING

(Addressed to the Chief Justice and Associate Justices of the Supreme Court of California:)

1

It appears from the opinion of this Court that it reached the conclusion that the Railroad Commission had not regularly pursued its authority in making the order involved in this proceeding, by taking it for granted that the Railroad Commission had in that order, as well as in the 1918 order, directed that, for the contract holders of the Sutter Butte Canal Company, the annual water rates should be *el*aculated upon the total area of their land described in their respective contracts, regardless of the area actually irrigated,

and that, for the non-contract users of water of that Company, the annual water rates should be calculated upon only the area of their respective holdings which was actually irrigated, regardless of [fol. 120] the area described in their applications to that Company for water for irrigation.

The following quotations are made from the opinion of the Court:

(Here follow quotations from said opinion omitted from this summary.)

The Court regarded the difference thus stated by it respecting the method of calculation of the annual water rates to be charged to these two classes of consumers to be the creation by the Railroad Commission of the illegal preference and discrimination, and accordingly annulled the order of 1922 insofar as the same affects the petitioners for the writ of review.

We respectfully assert that in neither of the orders of the Railroad Commission referred to above is there any provision, or direction, or intimation that the water rates to be charged to non-contract consumers of the Canal Company should be calculated in the manner stated by the Court, and that the Court's statement is incorrect.

In 1918, following the order of the Railroad Commission of that year, the Commission directed the Canal Company to discontinue thereafter the use of the form of contract described in the Court's opinion, and to use instead thereof, for all new consumers, the printed form of application for water set forth as Exhibit D in the petition for the writ of review herein. The Canal Company has acted in accordance with that direction since 1918. The application consists of a request to the Canal Company to furnish water for the irrigation of the land described in the application; a statement of the area of the land; a statement of the kind of crop or crops to be produced; and an agreement on the part of the applicant reading as follows:

"The applicant- agree- to pay for said water in accordance with your (Canal Company's) established rates for said service specified in Schedule —; payment to be made in installments at the times prescribed in your established rules and regulations on file with the Railroad Commission of the State of California.

The applicant- agree- to comply with said rules and regulations." [fol. 121] The persons who, since 1918, have established their relation with the Canal Company as consumers of its water by filling out and signing the above mentioned form of application, and whose applications have been accepted by the Canal Company, constitute the class designated by the Court as the "non-contract consumers." Strictly speaking, this designation is inaccurate, as the form of application, when filled out and signed by the applicant, and accepted by the Canal Company, constitutes a contract, but it may simplify the discussion to describe these consumers as the non-contract consumers, and the consumers who hold the old form of contract as the contract-holding consumers.

The rules and regulations of the Canal Company, on file with the Railroad Commission, which the non-contract consumers agreed to comply with, contain the following provisions: (Here follow quotations from Rules 1 and 2 of the Revised Rules and Regulations of the Sutter-Butte Canal Company omitted from this summary).

In the order made by the Railroad Commission in 1918 the Commission expressed its disapproval of the provision in the contracts theretofore made by the Canal Company fixing September first of each year as the time for the payment, in lump sum, of the annual water rates, and stated that it was of the opinion that it would work less hardship on the consumers to make payments in three installments. It was accordingly recommended by the Commission that a specified part of the rates should be paid "to accompany application," another specified part "on or before February first," and the balance "on or before July first." See 15 Ops. R. R. Com. 455.

These installment payments of the annual water rates, and the times of payment thereof, were accordingly prescribed in the established rules and regulations of the Canal Company on file with the Railroad Commission, and the non-contract consumers expressly agreed in their application to pay the water rates "in installments at the times prescribed" in these rules and regulations.

In the order of the Railroad Commission now under review, viz., the 1922 order, the practice established in 1918 respecting the pay-[fol. 122] ment of the annual water rates in three specified installments and at specified dates, is continued. It will suffice to quote the following from that order for illustration:

"Schedule No. 1—Flat Rates

Rice Irrigation

First year:

$1.00 per acre to accompany application.

$3.40 per acre, payable on or before February first, plus 70 cents per acre if water is pumped.

$3.40 per acre, payable on or before July first, plus 70 cents per acre if water is pumped.

Subsequent years during continuance of service:

$4.40 per acre, payable on or before February first of each year, plus 70 cents per acre if water is pumped.

$3.40 per acre, payable on or before July first of each year, plus 70 cents per acre if water is pumped."

There is not a word or hint in the Railroad Commission's 1918 opinion and order, or in its 1922 opinion and order, that the annual water rates chargeable against non-contract consumers shall be calculated at any time otherwise than upon the area of the land of the consumers definitely described in their respective applications, and it cannot be duduced therefrom that any other method of calculation was or is contemplated by the Railroad Commission.

Take the case of a new applicant for service of water for the irrigation of rice in 1923. He was required to make the application in any event not later than January 1, 1923, and was required to accompany his application with the payment to the Canal Company of $1 per acre of the land described in his application, and is required by the 1922 order to pay another installment of $3.40 per acre of the same land on or before February 1, 1923. The irrigation season for 1923 will commence, say, around the latter part of April or in May. Manifestly the payments per acre can only be calculated upon the area of land described in the application. They cannot be calculated upon the acreage subject to irrigation, because no part of the land has yet been irrigated. By July 1, 1923, it will be known how much of the land has been subjected to irrigation, but the basis of calculation for the installment of the water rate to be paid then remains as before.

[fol. 123] In the case of a non-contract consumer who applied for service on, say, January 1, 1922, for rice irrigation, and who definitely described his land in his application, and who continues on in 1923, that consumer is required by the 1922 order to pay $4.40 per acre on or before February 1, 1923, on the basis of the area of the land described in the application made by him in the previous year, regardless of the quantity of the land actually irrigated in 1922, and is required to pay $3.40 per acre on or before July 1, 1923, on the basis of the area of the land described in the application, regardless of the quantity of the land actually irrigated in 1923.

The foregoing sets forth not only the true meaning and effect of the order of 1922, but the practice of the Canal Company in its dealings with its non-contract consumers ever since the inauguration of the system of requiring written applications to be made to the Canal Company for water for irrigation purposes, and the adoption of the rules and regulations mentioned above, and the establishment of the Canal Company's water rates by the Railroad Commission. That Commission is aware of this practice of the Canal Company, and in no respect intended or attempted to change it in the 1922 order. The petitioners for the writ of review did not show that the practice of the Canal Company was otherwise than is herein stated, or that the Railroad Commission intended by its order of 1922 to change it so as to provide, as the Court erroneously assumed, that for the non-contract consumers the annual water rates should be calculated only upon the area of their respective holdings actually irrigated regardless of the area described in their applications.

This erroneous assumption has not only led this Court into annulling the order of 1922 insofar as it affects those petitioners, but may, if that assumption is allowed to stand, be productive of reparation claims against the Canal Company by the non-contract consumers. They will point to the opinion of this Court that by the orders of 1918 and 1922 the Railroad Commission provided that those consumers were chargeable with annual water rates calculated upon only the area of their respective holdings which was actually irrigated, instead of rates calculated upon the area of their land

[fol. 124] definitely described in their respective applications, and they will claim that therefore the Canal Company has exacted money from them in excess of what the Railroad Commission authorized. In the light of what is set forth above, it is clear that if this opinion is permitted to stand a grave error will be committed against the Canal Company as well as against the Railroad Commission.

The claim made by the petitioners for the writ of review is, in substance, that the Railroad Commission could not lawfully authorize a charge to be made against any consumer for water contracted or applied for but not used. That claim is not touched upon by the Court, its discussion of the case being based upon the erroneous assumption that a preference or discrimination was created by the Railroad Commission between the contract-holding consumers and the non-contract consumers of the Canal Company in respect to the method of calculating the water rates—a thing not even suggested by the petitioners for the writ of review in their petition to the Railroad Commission for a rehearing by that body, or in their petition to this Court for review of the Railroad Commission's order of 1922, and therefore not discussed in the briefs for the Railroad Commission and the Canal Company heretofore filed in this Court. We assume that the Court was led to make the erroneous assumption by the following remark on page 5 of "Petitioners' Closing Brief:"

"It (the Railroad Commission) has no power to authorize the Company to charge contract holders for acreage not irrigated while charging non-contract consumers the same acreage rate only for acreage irrigated."

Coming as this remark did in the petitioners' closing brief, with nothing additional said by way of attempted substantiation of the remark, it passed unnoticed by counsel for the Railroad Commission and for the Canal Company.

II

Although the Court did not deal in its opinion with the contention that the Railroad Commission could not lawfully authorize a charge to be made for water contracted or applied for but not used, [fol. 125] it may not be amiss for us to discuss that matter here.

A declaration by the Court that that contention is correct would be startling and serious to many public utilities which have been authorized by the Railroad Commission to make flat rates for services to be rendered, and to collect the full authorized rates although the patron of the public utility does not make full use of the services agreed to be rendered. For instance, the telephone company is authorized to make contract rates for service based on a fixed number of telephone calls to be made by the subscriber; the electric light company is authorized to make contract rates for service based on a fixed quantity of electricity to be used; the railroad company is authorized to make rates for passenger commutation tickets, and so

forth. According to the contention stated above, the Railroad Commission exceeded its powers in authorizing the telephone company to collect in full if the telephone subscriber did not exhaust his allowance of telephone calls and in authorizing the electric light company to collect in full if the company's consumer did not make full use of his allowance of electricity, and in authorizing the railroad company to withhold the money paid to it for the passenger commutation tickets if the purchaser thereof did not make use of all of these tickets. The Public Utilities Act, however, has vested the Railroad Commission with the power to deal with such matters, and makes its finding as to the reasonableness of rates conclusive (Public Utilities Act, Sec. 67). The carrying out of that power calls for the exercise of the discretion of that body, and questions as to the reasonableness of rates are questions of fact, to be decided by it, and not by the courts.

"That power has been vested in a single body, so as to secure uniformity and to prevent the varying and conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

Penn. R. Co. v. International Coal Min. Co., 230 U. S. 184; 57 L. Ed. 1446.

[fol. 126] It is only where the Railroad Commission has not regularly pursued its authority, or has clearly violated constitutional rights, that the Supreme Court can annul an order of the Railroad Commission.

San Joaquin L. & P. Co. v. Railroad Commission, 175 Cal. 74.

No showing has been made that any constitutional right, State or Federal, has been violated in this proceeding authorizing a charge to be made against both classes of the consumers of the Canal Company for water contracted for but not used by any consumer in either of these classes. The case is not different in principle from that where one leases property and asks to be relieved from payment of the agreed rental, or some part thereof, because he did not make use of the property during all of the term of the lease.

A contract whereby a consumer of a water company agrees to pay a specified sum of money for a specified quantity of water, whether the same is or is not used, is valid.

Marin Water etc. Co. v. Town of Sausalito, 168 Cal. 587, 598-9.

In San Leandro v. Railroad Commission, 183 Cal. 229, the Railroad Commission fixed the rates to be paid by the various municipalities served by the East Bay Water Company with water for municipal purposes. Included in this service was the supplying of water in mains and hydrants which could be used for extinguishing fires. The Railroad Commission pointed out that in fixing these rates it could not compute the rates to be charged against each municipality by the amount of water used by it because the demand for fire protection purposes could not be foretold, but

"the company must stand ready to deliver a large quantity of water within a short period at any point where the fire may occur. This has been designated a 'readiness to serve' or 'stand-by' service."

The Water Company contended, however, that it was not assuming [fol. 127] any obligation to furnish water for the particular purpose of fire protection, and because of this stand taken by the Water Company it was contended by the municipalities that the Railroad Commission was attempting to impose upon them charges for a service which they were not receiving. The Court said:

"The argument in this behalf, however, fails to distinguish between the furnishing of water for a particular purpose, such as for fire protection, and supplying it as a commodity merely, in the quantity and manner desired, but without reference or regard to the use to which it is put by the consumer. While the Company is not furnishing water to the municipalities for any particular purpose and is not liable for fire protection, it is furnishing water as a commodity which is ready for use and may be received and used by the municipalities for certain purposes, the most important of which is that of fire protection. * * * The Water Company must be compensated for the cost of operating and maintaining the portions of its system devoted to the requirements of the municipalities, and the 'services' in return for which the charges are imposed are those involved in supplying the water and maintaining the system."

In the case at bar the Canal Company must, both under the contracts involved herein, and under the accepted applications for water, hold itself in readiness to serve the entire acreage covered by the contracts and applications. It must and does maintain its water system to meet the requirements of all of its consumers. It must and does stand ready to serve them. It has the water ready for their use. If must be compensated for this service.

It is easy to see that the Canal Company's business would be demoralized if its non-contract consumers were allowed to play fast and loose by staying on or dropping off as a consumer, as they should see fit, after the time fixed by the Railroad Commission, viz., not later than January 1, for a non-contract consumer to give notice to the Company of discontinuance of service, and if the Company's revenue were thus made dependent upon the belated acts of these consumers.

The claim of the contract holding consumers of the right to be relieved from the payment of the annual water rates in whole or in part involves further the consideration of the bearing of the legal [fol. 128] effect of these contracts upon that claim. It has been held by this Court that such contracts amount to a grant of a water right, a burden or servitude upon the water system of the water company, a right to a part of its water, unlimited as to time; that the right to receive the water is a vested estate in realty of the nature of an easement; that this right is not forfeited by non use by the grantee, because an easement acquired by grant cannot be lost by mere disuse; that a forfeiture could result, however, if the grantor in some manner

informs the grantee that such forfeiture will be claimed because of non use, or asserts it against him by some hostile act.

Stanislaus Water Co. v. Bachman, 152 Cal. 716, 725;
Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291;
Palermo L. & W. Co. v. Railroad Commission, 173 Cal. 380.

In the case last cited it was held that as the Palermo Company had never given notice that it regarded the grantee's right to water terminated until about two years before the grantee applied to the Railroad Commission for an order requiring the Palermo Company to furnish water, that Company was bound to furnish the water even though there had been no demand made by the grantee for water for some of the grantee's land for over twenty years after the water right had been granted, and even though there had been a cessation of demand for another part of the grantee's land for a like period of about twenty years, and that the Railroad Commission rightly ordered the Palermo Company to furnish the water as demanded.

In view of these rulings, and of the fact that the contract holding consumers of the Canal Company had expressly agreed to pay annually for the water contracted for and agreed to be furnished, and that the Canal Company has in no way claimed a forfeiture of the rights of these contract holders to receive water for all of their lands, so long as they continued to abide by their contracts and paid the established annual rates, and that the contract holders on their part [fol. 129] claim that their contracts are valid and subsisting, and that the Court holds that the contracts stand as to all their provisions which are unaffected by the changes in rates ordered by the Railroad Commission, what rule of law, or State or Federal constitutional right, is there which denies the right of the Railroad Commission to order that these contract holders must pay water rates annually to the Canal Company calculated upon the amount of the area of their land described in their respective contracts? What is there in such an order which savors of unreasonableness or unfairness? What sound objection can there be to a ruling that one who has the right by contract to call for water to be served to his land at any time in the future, irrespective of the length of time he may defer the call, which right is observed and kept intact by the Canal Company for his benefit, shall pay a consideration to the Company for such right? Until this right of the contract holder is absolutely extinguished he cannot object if the Railroad Commission deems that it is proper to impose a charge against him in consideration of this right.

The fact that the order of the Railroad Commission fixing rates incidentally requires the rate payers to carry out the terms of a contract, does not operate to divest the Commission of its jurisdiction.

Motor Transit Company v. Railroad Commission, 64 Cal. Dec. 278, 283.

The Court states in its opinion in this case that the contracts made by the Canal Company do not contain any express provision binding it

"to maintain a reserve of water sufficient to irrigate the entire acreage of each of these contract holders if from time to time the same should be required, and hence was entitled to charge and collect a rate calculated upon such acreage."

All of the contracts expressly provide that the Canal Company will furnish to each contract holder a specified quantity of water for the irrigation of the land described in each contract. The quantity specified was computed at the rate of one cubic foot of water per second for |fol. 130| each 160 acres of the land for crops other than rice, or three cubic feet per second for each 160 acres for rice crops. We have shown above that such contracts are held to constitute grants of rights to part of the Canal Company's water, to be burdens or servitudes upon the Canal Company's system to be vested estates in realty of the nature of an easement, non forfeitable by mere disuse, and therefore enforceable at any time by the grantee.

What is said by the respondents in this case in respect to the effect of these contracts is in no wise inconsistent with the position of either the Railroad Commission or the Canal Company in the case of Butte County Water Users' Association v. Railroad Commission, 185 Cal. 218. In that case a number of contract holders of the Canal Company owning lands in Butte County endeavored to prevent the Company from furnishing water to new consumers in Sutter County. That proceeding was instituted at a time when it was feared that there might be a shortage of water in Feather River (the source of supply of the Canal Company), and that the Company might not have enough water to meet the requirements of the contract holding consumers in Butte County and the new consumers in Sutter County. It was contended on behalf of the contract holding consumers that they were entitled to be furnished with water to the exclusion of the new consumers because they, the contract holders, were consumers prior in time to the new consumers, and must be served first. This contention was overruled because the new consumers in Sutter County became such at a time when it was reasonably anticipated that the Canal Company's supply of water would be adequate to meet the requirements of both the old and new consumers, and it was therefore held that by virtue of Sec. 6 of the Act of April 25, 1913, the water available for distribution, if there should be a shortage of supply, should be apportioned ratably among all of the Canal Company's consumers. The Court was careful to limit its ruling to the situation above stated, as appears from the following quotations from its opinion:

"What we have just said has, of course, application only to the company's regular consumers, that is, to those who have entered into |fol. 131| relationship with it and whom it has undertaken to serve on the basis of its having an adequate supply for that purpose. It has no application as between such consumers and what we may call surplus consumers, that is, consumers whom the company undertakes to serve only when and as it has a surplus over and above the needs of its regular consumers. As between these two classes, and very

possibly as between individuals in the second class, a preferential right can properly exist. * * * A water company supplying water for irrigation has not the power to take on new consumers without limit. Its power to supply water is, of course, limited by the amount of its supply, and when the demands of its consumers upon it have reached this limit, it has no right to take on new consumers to the necessary injury of those it has."

When it is said that the Canal Company is not free to dispose of the water which it has agreed to furnish to its contract holding consumers, the test of the correctness of that statement is not what the demands on the Canal Company's supply may be today, or what one may guess they may be in the future. The correctness of that statement is to be tested by what the Court has determined to be the legal effect of such contracts, and what the Court has declared respecting the limitations upon the right of the Canal Company to take on new consumers.

III

It is stated in the Court's opinion that the effect of its decisions in the Leavitt and Limoneira Company cases is to place a limitation upon the powers of the Railroad Commission, as well as upon a public utility water company, to create or allow preferences and discriminations between the consumers of the water of the public utility, equally situated, in so far as the service of water is concerned.

We have shown that the Railroad Commission did not create a preference or discrimination between the two classes of consumers of the Canal Company in respect to the basis of the calculation of the annual water rates; that for the non-contract consumers the calculation is to be made upon the basis of the area of the land definitely described in the respective applications of those consumers, and that for the contract holding consumers the calculation is to be made [fol. 132] upon the basis of the area of the land definitely described in the respective applications of those consumers, and that for the contract holding consumers the calculation is to be made upon the basis of the area of the land definitely described in their respective contracts.

The Railroad Commission did, however, fix a lesser rate per acre in favor of the contract holding consumers than it fixed for the non-contract consumers, and also provided that new consumers could have the benefit of the lesser rate by making an initial payment of $10 per acre. Is this an invalid preference or discrimination? The Railroad Commission deemed it to be justified in consideration of the initial or advance payments already made to the Canal Company by the contract holding consumers, and in consideration of the advance payment to be made by new consumers wishing to recieve the benefit of the lesser rate. Subd. (b) of Sec. 17 of the Public Utilities Act prohibits a public utility from extending to any person any contract or agreement, or any rule or regulation, or any privilege except such as are regularly and uniformly extended to all persons, but expressly provides that the Railroad Commission

"may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

Sec. 67 of that Act also provides that the findings and conclusions of the Railroad Commission on questions of reasonableness and discrimination "shall be final and shall not be subject to review."

The particular contract holding consumers on whose behalf this proceeding was instituted do not object to the lesser rate of which they are the beneficiaries. They are willing, apparently, that it should stand, for the relief prayed for in their petition for rehearing is that the 1922 order of the Railroad Commission be annulled only

"in so far as the same makes provision for the collection of rates upon any acreage other than that upon which water may be desired by these petitioners."

[fol. 133] The Court has not stated whether or not it regards the lesser rate fixed for the contract holding consumers as an invalid preference or discrimination as against the non-contract consumers, that is, whether or not the Railroad Commission exceeded its jurisdiction in this respect. The judgment of the Court, however, directs that the 1922 order of the Railroad Commission, "insofar as the same affects these petitioners, is annulled." Does the Court intend that the lesser rate fixed for the contract holding consumers shall be annulled, and that there shall be but one rate for both classes of the Canal Company's consumers?

(Prayer for rehearing, dated January 24, 1923, signed by the attorneys for the respondent Sutter-Butte Canal Company.)

Petition of Railroad Commission for a Rehearing

(Addressed to the Chief Justice and Associate Justices of the Supreme Court of California.)

The Railroad Commission of the State of California, respondent herein, respectfully asks that a rehearing be granted in the above-entitled matter.

The proceedings of the Railroad Commission, which were reviewed by the Court herein, resulted in the making of an order by the Commission fixing the rates of the Sutter-Butte Canal Company, a public utility water corporation. In fixing these rates, the Commission, after numerous hearings and basing its conclusions upon facts established by abundant evidence, both written and testamentary, allowed [fol. 134] the continuance of a certain classification of consumers with different schedules of rates for the respective classes. This Honorable Court has, in effect, held that the rates thus established are discriminatory.

Thus, we respectfully submit, the finding and conclusion of the Railroad Commission, that a classification of the canal company's

consumers for rate-making purposes, was reasonable under all the facts and circumstances of the case, has been set aside and the judgment of the Court has been substituted for that of the Commission on the ultimate question of discrimination. We respectfully submit that the Court has erred. We are convinced, after a careful study of the Court's decision, that all of the facts bearing upon the question of discrimination were not clearly pointed out nor fully discussed in the briefs, and therefore, respectfully urge that a rehearing be had for further consideration on a fundamental issue of jurisdiction herein presented.

There is involved in this proceeding, not only the jurisdiction of the Railroad Commission, to make the order under review, but also the more vital question of the jurisdiction of the Supreme Court to review this particular kind of an order. The Constitution and Public Utilities Act, in providing for the exercise of regulatory powers by the Commission, has expressly limited and defined the extent to which the decisions of the Commission shall be subject to judicial review.

"No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order of the commission. * * *" (Sec. 67 Pub. Utilities Act.)

The statute also provides:

"The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

With all deference, we submit that the decision of the Court herein goes beyond the limits thus placed upon the Court's jurisdiction. [fol. 135] We respectfully urge the vital necessity of maintaining the finality of the Commission's conclusions on the questions of discrimination in all proper cases. The Supreme Court of the United States, in Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U. S. 184, 57 L. ed. 1446, has said:

"Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rates with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the Courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

The well known principle enunciated in the foregoing statement by the Supreme Court was relied on by the Appellate Court of this State in the case of Southern Pacific Co. v. Superior Court, 27 App. Rep. 253, in which a petition for rehearing by this Honorable Court was denied after the judgment in the District Court of Appeal.

Provisions in the Public Utilities Act expressly authorize the Railroad Commission to establish differences in rates, based upon different facts and circumstances of service. The question of whether or not such a difference is proper in any case involves the exercise of judgment on the part of the Commission and a determination by it is an "ultimate conclusion" on a question of "resonableness" within the meaning of section 67, above cited.

These sections of the act (17 (B) and 19) not only carry out the principle enunciated by the United States Supreme Court but are directly applicable to the present case in that they contain the authorization relied upon by the Railroad Commission in ordering a classification of consumers for rate-making purposes in the order under review.

[fol. 136] Section 17 (b) of the Public Utilities Act provides in substance:

"Except as in this section otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished * * *, or for any service rendered * * * than the rates, tolls, rentals and charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, * * * nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons; provided, that the commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

Section 19 of the Public Utilities Act provides:

"No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section."

We respectfully call attention to the fact that the law thus expressly provides for necessary differences in rates between different classes of consumers. We labor under no doubt as to the Court's recognition of this fundamental proposition. We believe it is not

amiss, however, to review the above quoted sections in connection with the provisions of section 67 of the Public Utilities Act to which we have already referred, as follows:

"The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

In view of the legal principles above outlined, we respectfully submit:

[fol. 137] The classification by the Commission of the consumers of the Sutter-Butte Canal Company for rate-making purposes was not arbitrary, but was based upon facts showing that a difference in rates was reasonable.

We respectfully contend that discrimination in the legal sense exists only where an arbitrary difference in rates is made effective for the identical form and character of service rendered to different consumers. Statements are frequently made concerning "lawful discrimination" and "unlawful discrimination," indicating that the lawfulness in each instance depends upon whether or not a reasonable classification has been made among consumers, or whether the difference has been authorized by some regulatory body. It is to be noted that under the provisions of the Public Utilities Act above quoted, the term "discrimination" is not used. In substance, however, these provisions prohibit only such differences in rates as are "unreasonable" upon facts determined by the Commission, and permit differences from the filed schedules which are allowed and "established" by the Commission as "just and reasonable."

Without attempting in the brief time available for the preparation of this petition to quote or cite selected portions of the record upon which the Commission acted, we desire to review the facts which we believe are properly determinative of the reasonableness of the classification of the so-called contract and non-contract consumers. In this and prior proceedings dealing with the canal company, the records in which were made a part of the record under review, the history of this utility from its inception was fully discussed.

The original company, the Butte County Canal Company, after making appropriations of water, proceeded to negotiate with the land owners in the vicinity for the sale of this water on a plan that would assure the success of the enterprise which had been undertaken. In this they were confronted with certain practical problems. The cost of construction of the canals was great and a sufficient number of consumers had to be obtained, who would agree to pay for the delivery of the water to their lands on a basis that would assure the canal company of a constant annual income. The contracts with [fol. 138] consumers, therefore, provided for the payment on a basis of acreage owned by the consumer rather than upon the basis of water actually used each year. To the consumer, this plan gave assurance that the company would always be obliged to irrigate the

lands covered by the contracts and that any future extensions would be limited to the supply which the company had available to meet these contract provisions. It also became apparent at an early stage in the development that the previous character of the soil in many places caused lands immediately adjacent to the canals to be subirrigated by seepage from the canals, so that crops could be raised with no application of water to the surface of the lands thus located. Furthermore, in similar soils, the intensive irrigation of a few acres by the ordinary method of application of water on surface of the land would effectually subirrigate a much greater acreage surrounding that to which the water was applied. In such instances, a charge for acreage actually irrigated would be manifestly unjust. Installation of meters was unreasonably expensive, and, in many cases, wholly impracticable because of the low grade of the ditches which would not permit a sufficient head pressure at the service points to measure accurately the water furnished. Under all of these circumstances, the conclusion was reached that the water should be disposed of under contracts requiring: (1) an initial payment which would help to defray the cost of construction of the necessary main ditches and laterals; (2) a provision that the water should be made appurtenant to all of the acreage of the consumer; (3) a provision for the furnishing of necessary rights of way and for the installation by the consumer of necessary head-gates and diversion ditches, and (4) the provision that annual rates should be paid on a basis of total acreage covered by the contract. These contracts contained the further provision to which reference was made by this Court in its decision in the case of Butte County Water Users' Association v. Railroad Commission, 185 Cal. 218, to the effect that the canal company might contract for the delivery of 1,000 cubic feet of water per second on a similar basis.

The plan above outlined was carried on without apparent need for [fol. 139] change until the development of rice culture became so extensive that large demands were made upon the canal company for service of water for this purpose. This form of agriculture brought in new conditions of service. Successful experiments in rice growing led to rapid development of speculative operations on a large scale. Tracts of land theretofore considered of such inferior quality as to be unworthy of cultivation proved to be good rice land. This led to a rapid extension of the canal company's system, and also to the adoption of a new schedule of rates, whereby the land owners, instead of signing contracts, and thereby becoming permanent consumers, were permitted to file an application on January first of each year, designating the acreage to be charged. It is important to notice that under the new schedule of rates applied to non-contract holders the charges were not based upon lands actually irrigated, but upon total acreage designated in the application. True, the owner could more accurately determine whether or not the lands thus designated would in fact be irrigated, but it often happened that only a portion of the lands covered by the application was actually irrigated. It is also important to notice that this variation from the old method of rates specified for contract-holders was

primarily due to the fact that the owners of the land were uncertain as to whether or not water would be wanted for more than one year. Owners of land of little or no value except for rice growing could not be reasonably required to become consumers on the same basis as contract holders. The acquisition of a permanent water right, which would be appurtenant to the land and an easement on the canal system, was not desirable. Rice growing was speculative. The history of the rapid fluctuations in rice culture has been reflected in the record of applications made to the canal company for water to be furnished under the new schedule of rates which was adopted to meet this new condition of service.

When the Railroad Commission was called upon in 1918 to fix the rates of the Sutter-Butte Canal Company, it was confronted with a situation reflecting all of the variations of service as above outlined [fol. 140] as well as other complications, more fully discussed in the Commissioner's decision of March 25, 1918 (15 C. R. C. p. 425). The Commission found that not only were new tracts of land being served with water for rice culture under the non-contract rates, but that some of the old contract-holders were also engaged in rice growing. Also, some portions of the new land were being devoted to crops other than rice. The Commission, therefore, in its 1918 decision, sought to eliminate so far as possible, all unreasonable differences in rates, but did recognize that the two schedules for contract and non-contract holders were established and had grown up for substantial reasons and that a classification of consumers on this basis was reasonable. The rates established by the decision now under review differ from those of 1918 only in so far as the amount to be paid per acre by each class of consumer is changed. The same consideration which justified the classification of consumers in 1918 prevail at the present time.

In the brief heretofore filed by the respondent, Railroad Commission, the facts upon which the Commission based its classification of consumers were not discussed. Attention was focussed upon the legal question of whether or not the old contracts were abrogated or superseded in whole or in part. The decision of the Court has pointed out that in some respects the contracts are not superseded. The Court specifically mentions the provision making the water right appurtenant to the land as one of the clauses not superseded by the Commission's rate-fixing orders. We respectfully submit that this provision alone affords a substantial basis for a difference in rates as between contract and non-contract consumers.

The value to the contract-holder of this right to have the water appurtenant to the land is fully established by the decision of this Court in Palermo L. & W. Co. v. Railroad Commission, 173 Cal. 381.

In this case land was sold in Butte County by the Palermo Company in 1888. The instrument of conveyance provided that the company would

"furnish from its ditches up to the lime of said land nearest to the main or branch ditch, pipe or flume of said party of the first part,

[fol. 141] such water as may be necessary to irrigate such trees, vines or cultivated crops, not exceeding one miner's inch for every seven acres."

For this right to receive water, the consumers, as in the present case, made substantial payments. Some of the land owners, however, did not use any water on their land for 20 years. The Court said:

"The findings of the Commission show that the Palermo company sold its land at prices ranging from fifty dollars to one hundred dollars per acre in excess of the value of the land without water, and that the additional price was paid in reliance on the agreement of the company to supply the necessary water. It can hardly be supposed to have been in the contemplation of a grantee taking land under these conditions that the water right for which he had thus paid would be forfeited to the grantor because of his failure to make use of it within any given time. The covenants in the deeds were not a mere agreement to sell a personal property in the future. They were a present grant of a water right, which constituted a burden or servitude upon the water system of the grantor. (Stanislaus Water Co. v. Bachman, 152 Cal. 716, 725 (15 L. R. A. (N. S.) 359, 93 Pac. 858); Southern Pacific Co. v. Spring Valley Water Co. ante, p. 291, (159 Pac. 865). The grantees thus being the owners of an interest in the water right, the case falls directly under the authority of Copeland v. Fairview Land Co. 165 Cal. 148, (131 Pac. 119). As is there pointed out, an easement acquired by grant is not lost by mere disuse. Smith v. Worn, 93 Cal. 212, (28 Pac. 944; Currier v. Howes, 103 Cal. 431, (37 Pac. 521); People v. Southern Pacific Co., 172 Cal. 692, (158 Pac. 180). In the Copeland case the court says that where one acquiring a water right sells an interest in it to another, and thereafter continues to divert the water himself for the vendee, the fact that the vendee does not demand or use the water he has bought will not "forfeit his right thereto to the vendor who has in the meantime continued the diversion, unless such vendor in some manner informs the vendee that such forfeiture will be claimed because of nonuse, or asserts it against him by some hostile act. Mere failure to take and use the water for which he has, at the time, no need, will not forfeit the right to the vendor, in such a case. (Copeland v. Fairview Land etc. Co., 165 Cal. 166, (131 Pac. 126).)."

In view of the above authority there can be no doubt that the contract holders possess a valuable right not possessed by the other consumers. A great many of the contract holders fully recognize the value of this right and do not wish to part with it. And this Court has, as we have said, recognized its existence in the present case. A natural and legal basis for classification therefore exists between con- [fol. 142] tract and non-contract holders. The Commission cannot escape the necessity of recognizing such a classification even under the Court's decision as it now stands. The problem which the Commission had to solve in the 1918 and 1922 proceedings and which it

will have to solve in the next rate proceeding if this decision stands, is to prescribe a rate that will be fair and just between the class who hold appurtenant water rights for which they paid a substantial advance payment and those who have applied for water prior to January 1st of any year, but who do not own land with this appurtenant water right.

Fundamentally, the difference is between permanent consumers and year to year consumers. As between these two classes there is an important difference in character of service rendered. This difference is one of fact. Viewed over a period of years, it is manifestly true that a utility can reasonably be required to charge a less rate for its commodity where the number of consumers and the amount of sales are assured than where the consumers and income are not assured, but vary from year to year. The cost of maintaining an expensive ditch system in readiness for service is proportionately less for long time consumers than it is for short time consumers. The Commission has recognized and we respectfully submit, the court must concede this difference.

The problem of establishing just rates for these two classes of consumers cannot be solved by ignoring their existence and fixing a single uniform rate for all consumers. This would result in a discrimination against the contract holders because they have made initial payments. Neither can it be solved by merely authorizing the company to collect from the contract holders on the basis of the land they actually irrigate. This would result in a discrimination against the non-contract holders who must specify before January 1 of each year, the acreage for which they desire the company to reserve water and who must then pay on the basis of this acreage regardless of what they actually irrigate. Furthermore, a rate for all consumers based upon the acreage actually irrigated or upon the amount of water actually used is impracticable for the reasons already discussed. The only possible solution of the problem is the [fol. 143] one the Commission adopted; namely, to fix a rate for contract holders which would apply to all the acreage covered by the contracts and to fix a higher rates for other consumers which would apply to all of the acreage covered in the application required to be made before January 1 of each year.

We have indicated that the lower rate for contract holders is justified because of the lesser cost of maintaining the permanent service. The only advantage the non-contract holders have over the contract holders is that by designating from year to year the amount of land for which they wish water reserved, they exercise a slightly greater freedom of choice than the contract holders whose land is designated permanently in the contract. This advantage is offset by the higher rate charged non-contract holders, but in neither case is the rate calculated upon the acreage actually subjected to irrigation, nor was it practicable so to calculate it for the reasons above pointed out.

We understand the Court's decision as holding that discrimination exists between these two classes of consumers. Apparently the Court has predicated this holding of discrimination upon the as-

sumption that the non-contract holders paid only upon the basis of the land actually irrigated, while the contract holders paid a rate calculated upon the full acreage designated in the contract. This assumption, as we have pointed out, is erroneous.

We have endeavored in this petition to point out the facts relied on by the Railroad Commission in permitting the continuance of a classification of the canal company's consumers for rate making purposes. We desire to express our regret that the necessity for so doing in the brief heretofore filed by us was lost sight of in the discussion of the legal phases of the consumers' contracts, concerning which it now appears the Court entertained no doubts. However, in view of what has been shown, indicating that the Commission's ultimate finding and conclusion on the question of discrimination was a reasonable and necessary conclusion from established facts, we respectfully submit that the Commission has not exceeded its jurisdic-
[fol. 144] tion; that its conclusion is final and not subject to review and that its order should be affirmed.

(Dated January 24, 1923, signed by the attorneys for the respondent Railroad Commission.)

PETITIONERS' OPPOSITION TO REHEARING

(Addressed to the Chief Justice and Associate Justices of the Supreme Court of California.)

The Railroad Commission and the Canal Company separately petition for rehearing. This opposition is directed to both. The contentions on which rehearing is sought are answered in their logical order rather than in the scattered order in which those contentions are presented in the separate petitions. Thus rearranged, they appear to be as follows:

1. That this Court was without power to act in this case.
   Commission's Petition, pp. 1-8.

2. That this Court misunderstood and misstated the effect of the order which it annulled.
   Company's Petition, pp. 1-12.

3. That this Court did not consider the facts upon which the annulled order was made.
   Commission's Petition, pp. 8-13.

4. That this Court erroneously decided that the Commission may not make rates for seasonal utility service.
   Company's Petition, pp. 12-17.

5. That this Court misconstrued the contracts involved.
   Commission's Petition, pp. 14-20;
   Company's Petition, pp. 17-26.

I

[fol. 145] The Jurisdiction of this Court is Ample

The Commission's contentions on this subject are at variance with the statement contained in its brief on the submission of the case. It there said:

"The Court has authority under Section 67 Public Utilities Act to either affirm or set aside the Commission's order or decision."
Commission's Br., p. 22.

The Commission now contends that under that section of the Public Utilities Act, this Court has no power to determine whether or not the Commission's findings and conclusions on questions of fact result in violations of law. It contends that its own determination of reasonableness and discrimination as questions of fact is final as a matter of law.

If this contention has not already been answered in Leavitt v. Lassen Irrigation Co., 157 Cal. 82; Limoneira Co. v. Railroad Commission, 174 Cal. 232, quoted in the opinion in this case, and by the numerous cases in which this power of the Court has been exercised, but one demonstration of its fallacy remains, which is by the old geometrical reductio ad absurdum. Under the contention of the Commission, carried to its logical conclusion, it might rightfully determine as a question of fact that some consumers of water own only 80 acres of land and others 160 acres, and wrongfully determine as a question of fact that there would be no discrimination if it made rates by which the owners of 160 acre tracts should pay twice as much per acre, or half as much per acre, as the owners of 80 acre tracts, or, on metered service it might determine that the man who had five children should pay more per unit of measurement than he who had two children, or ten. In both cases the determination of the questions of fact would be conclusive, but it it should be adjudged that the Commission's conclusion that rates based on such classifications were not discriminatory is final as a matter of law, the Commission would have it in its power to make classifications to enrich one man and to destroy another. Such power is tyrannous in its essence, and obnoxious to the fundamental principles [fol. 146] of American constitutional government. Such a construction of the Public Utilities Act would necessarily involve Federal questions under the Fourteenth Amendment of the United States Constitution. Such a construction could not stand the test of the Federal Courts.

II

This Court Neither Misunderstood nor Misstated the Effect of the Order Annulled

The Company, on page 4 of its Petition, in italics, says:

"We respectfully assert that in neither of the orders of the Railroad Commission * * * is there any provision, or direction,

or intimation that the water rates to be charged to non-contract consumers * * * should be calculated in the manner stated by the Court, and that the Court's statement is incorrect."

The Court said (Company's Petition, p. 3) that as to non-contract consumers the order annulled provided for a rate to be based upon the amount of their respective holdings actually subjected to irrigation in each particular year. A reading of the entire decision shows clearly that what was meant was exactly what is pointed out in the Commission's Petition:

"Successful experiments in rice growing led to rapid development of speculative operations on a large scale. Tracts of land theretofore considered unworthy of cultivation proved to be good rice land. This led to a rapid extension of the Canal Company's system and also to the adoption of a new schedule of rates, whereby the land owners, instead of signing contracts, and thereby becoming permanent consumers, were permitted to file an application on January first of each year, designating the acreage to be charged. It is important to notice that under the new schedule of rates applied to non-contract holders the charges were not based upon lands actually irrigated, but upon the total acreage designated in the application."

Commission's Petition, p. 11.

"The application consists of a request to the Canal Company to furnish water for the irrigation of the land described in the application a statement of the area of land," etc.

Company's Petition, pp. 4-5.

[fol. 147] In other words the order annulled provided that the non-contract holders should pay upon the basis of the amount of their respective holdings actually subjected to irrigation in each particular year, while the contract holders were required to pay on the acreage of all land owned by them, whether subjected to irrigation in any year or not. This was what the Court said, and what the Company says is not the fact.

III

The Court Gave Full Consideration to the Facts Before It. It Will Not Consider ex Parte Statements off the Record

In a somwhat highly colored and argumentative statement on pages 8 to 13 of the Commission's Petition it seeks to justify the discriminatory schedules and order annulled. Many of the statements of fact, if the facts are as stated, are entirely lacking from the record certified by the Commission to this Court in answer to the writ of review. Some of the statements are of a character to cast a doubt upon the others. A single instance of the unreliability of the statements is in regard to metered service. In the 1918 de-

cision of the Commission it gave serious consideration to the advisability of establishing measured meter rates. (Petitioner's Closing Brief, pp. 13-15.) The schedules following that decision provided for such rates. The decision annulled provided for metered rates. In the opinion on which it rested the Commission said:

"If the entire system were metered, as has been recommended by the Commission, and all water paid for on a measured basis, a situation might be presented which would justify the elimination of the annual acreage charge on unirrigated lands."

Decision 10,373, Adv. Sheets C. R. C., p. 626.

Compare that statement with the following from the Commission's Petition for Rehearing:

"It also became apparent at an early stage in the development that the previous character of the soil in many places caused lands immediately adjacent to the canals to be subirrigated by seepage from [fol. 148] the canals so that crops could be raised with no application of water to the surface of the lands thus located. Furthermore, in similar soils, the intensive irrigation of a few acres by the ordinary method of application of water on surface of the land would effectually sub-irrigate a much greater acreage surrounding that to which the water was applied. In such instances, a charge for the acreage actually irrigated would be manifestly unjust. Installation of meters was unreasonably expensive, and in many cases, wholly impracticable because of the low grade of the ditches which would not permit a sufficient head pressure at service points to measure accurately the water furnished."

Commission's Petition, pp. 9-10.

In the record certified there was nothing to support that statement. If, notwithstanding the absence of evidence, the statement of facts were true, and the facts were within the knowledge of the Commission, why did it in 1918, and again in 1922, urge the desirability of installing meters to measure all water? Why did it by both decisions establish metered rates? Why is it any more unjust to charge contract holders for water actually used than so to charge non-contract holders? Is the subirrigation from irrigated non-contract lands less than from contract lands, or the seepage from canals in contract territory greater than in non-contract territory? What was the purpose of this statement in the Commission's petition? How does it help this Court to be told that the Commission considered matters, which if true, demonstrate that in all that the Commission said in regard to installation of meters and establishing meter rates it was at least lacking in frankness? It is easier to believe that these statements represent the afterthought of over zealous counsel, and that the failure to cite the portions of the record to support them was not so much from lack of time as lack of the record.

IV

This Court Did Not Decide That Utility Charges Must Be Based Solely Upon the Use, but That for Similar Demands the Same Burdens Should Be Borne by All Consumers.

On pages 12 to 17 of the Company's petition an attempt is made [fol. 149] to induce this Court to believe it has been guilty of an absurdity, which does not exist. Instancing telephone contracts and railroad commutation tickets, the Company endeavors to show that the decision of this Court will permit a water consumer to apply for water for a season's irrigation of a specified number of acres, and during the season to reduce his season's demand, or at the end of the season claim he has only irrigated a part of the lands which by his application he subjected to irrigation for that season.

All that the decision determined in this regard was that from year to year the contract holders should have the same right as the non-contract holders to designate the number of acres to be subjected to irrigation in the particular year.

The non-contract holders must specify each year the acreage for which they desire the Company to reserve water for that year, and they must pay on the basis of that acreage regardless of what they actually irrigated. (Commission's Petition, p. 17.)

"The only advantage the non-contract holders have over the contract holders is that by designating from year to year the amount of land for which they wish water reserved, they exercise a slightly greater freedom of choice than the contract holders whose land is designated permanently in the contract."

Commission's Petition, p. 18.

While this statement both answers the contention of the Company and shows the discrimination upon which the order was annulled, it is misleading in two particulars. The "slightly greater freedom of choice" means that the non-contract owner of 160 acres of land may designate this year 40 acres, next year 80, and the next year none of his land, and he will pay on acreage rates for 40, 80, or no acres to the Company, while his neighbor contract owner of 160 acres will pay acreage rates on 160 acres for each of the three years for exactly the same use. This slightly greater freedom of choice under repeated rate increases may mean the difference of the non-contract consumer paying Federal income taxes and the contract consumer going through the Federal Bankruptcy Court.

[fol. 150] Nor is this "slightly greater freedom of choice" the only advantage. The non-contract owner may mortgage or sell his land upon showing clear title, regardless of the fact that there may be an honest dispute with the Water Company concerning a charge which he knows to be unwarranted, but the contract owner's title is already clouded by a provision for a lien in favor of the Water Company, of uncertain amount for all past as well as for all future water bills. However certain he may be that the Company is asserting a claim

which is not warranted, no careful examiner of title would pass for a client for mortgage or purchase the title to a single acre of his land, even though that acre had never been irrigated, or was unsusceptible of irrigation, without a release from the Water Company. Since the contract purports to run with the land, and the whole of it, if he wanted to sell one-half of his 160 acres, because of a bed of pottery clay, or some other mineral deposit, the Water Company might make demands for release entirely inconsistent with any measure of fair dealing. It is not suggested that the Company would do this, but its possibility is as worthy of consideration as are the suggestions, on page 17 of its petition, of demoralization of the Company's business to follow the decision of this Court.

V

This Court Did Not Misconstrue the Contracts

In both the Commission's Petition (pp. 14-20) and that of the Company (pp. 17-26) the nature and effect of the contracts are sought to be again argued, on practically the same grounds as those presented in their respective briefs in the main case. It is not necessary to repeat the reply argument contained in the closing brief of the original petitioners. The decision of the Court speaks for itself and it is conclusive.

In Conclusion

If for any reason the Court should be disposed to grant a rehearing, before reaching a determination to do so it is most respectfully [fol. 151] suggested that it should consider one feature of the case in which its decision appears to the original petitioners to be conclusive of all the claims now made by the original respondents. While the statement of the Court, commencing at the bottom of page 71 (65 Cal. Dec. 69-71) and ending near the bottom of page 73, needs no elucidation on the part of counsel, a re-statement of the position of the original petitioners in regard to the contracts may answer the double barreled and not wholly disingeneous question with which the Company's petition is closed. It is there asked:

"Does the Court intend that the lesser rate fixed for the contract holding consumers shall be annulled, and that there shall be but one rate for both classes of the Canal Company's consumers?"

It is fundamental that no state may change the obligations of contracts, save only when the contracts themselves so provide, and then only to the extent to which the contracting parties to lawful contracts have agreed either expressly or in contemplation of law. The existing law, of course, is a part of every contract. The contracts in question here were lawful, and a part of each contract was the provision of the State Constitution that the use of the water regarding which the contract was made was subject to the regulation and control of the state. (Const. Cal., Art. XIV, Sec. 1.)

The reserved power in the state was to regulate and control the use of the water. The contractual right to a stated number of miner's inches of water was subject to the power of the state to reduce the amount for the common good. In contemplation of law that was as much a part of each contract as though it had been expressed. If this particular power had been exercised, the contracting land owner would have been in the position of one who had contracted to pay rent for ten years for a tenement taken from him at the end of five years by the exercise of the power of eminent domain. He would not thereafter be required to pay for what he did not receive. The consideration for his promise would have failed in part. What already had been paid on account of current rents could not be recovered by him. If he had made advance payments on account of [fol. 152] rents of later years, he would be entitled to repayment pro tanto.

The power to fix rates is an incident to the power of regulation of the use of water. (Limoniera v. Railroad Commission, 174 Cal. 232-238.) The contractual right of the contract holders to a particularly low rate was subject to this power of the state, as completely as though it had been so written in the contract. When this particular power was exercised by the state and the contractual rate per acre was raised the legal result was the same in principle as that which would have followed the exercise by the state of the power to make it impossible for the Water Company to supply the amount of water contracted to be delivered. There resulted the same legal failure of consideration moving the land owner.

The executed portions of the contracts relating to the building of canals and rights of way therefor could not be affected by a mere change in either the amount of water contracted for or the rate per acre or per unit of metered measurement. The executory portions of the contracts as to future deliveries and payment alone would be affected. Confining the analysis to those features of the contracts, they provided that, subject to the exercise of either power by the state, the Company for all future time would deliver the contractual amount of water to the consumer at a fixed low acreage rate of service. In consideration of the two obligations of the company to deliver for all time the fixed amount of water, and to charge only the low acreage rate, the consumer agreed for all time to pay the low acreage rate applied to all his land whether irrigated or not, to subject all his land to an indefinite lien for water bills, and in addition to make an advance initial payment. No lawyer would hesitate in saying that if by reason of the exercise of the superior power of the state the Company could not fulfill its first obligation to deliver the contractual amount of water, it could not thereafter hold the consumer to his reciprocal obligations. Neither should there be hesitancy in stating that if by reason of the exercise of the superior [fol. 153] power of the state the Company cannot fulfill its second obligation to charge no more than the contractual sum per acre, it cannot thereafter hold the consumer to his reciprocal obligations. The obligation to submit to the lien on all the consumers's land and the ob-

ligation to pay for all time on the entire acreage owned by him, whether irrigated or not, both fell for want of consideration when the state increased the rate per acre. As a matter of law this was contemplated by the contracts at the time of their inception because they were made subject to the constitutional provision reserving the power to the state to regulate the use of the water and the incidental power to fix rates. In regard to the third element of consideration for contractual low acreage rate, namely the advance payment per acre on the entire acreage, the legal result of the increased acreage rate is quite as clear, although there may be some reasonable basis for different views concerning the nature of the remedy to be awarded at some time, in some forum, upon some reasonably just and fair measurement. The advance payment of $10.00, or more, or less, per acre was on account of water to be served for all time at the contractual low rate. The Company by the exercise of the superior power of the state can no longer fulfill its contractual obligations, and it is not therefore entitled to retail the full consideration it received in advance. It may be that a court of equity may have to determine in accordance with the rules of equity jurisprudence how much of such advance payments should be returned to those who by them, under the new conditions, enabled the Company to be unjustly enriched. It may be that the Railroad Commission in the exercise of its powers can reasonably make a classification with differential rates, as distinguished from preferential rates and practices, of those consumers who have made advance payments upon a consideration which has failed and those who have not made such payments. This is a matter not now before this Court on the petitions for rehearing and has been suggested only for the purpose of answering the Company's closing question. What has been said upon this subject leads to the conclusions which these petitioners reached from [fol. 154] a reading of the more concise statement in the decision of this Court:

1. As between contract holders and non-contract holders there are not two classes, but one only, because, as the Court determined, there is no reasonable ground for such a classification and it is discriminatory.

2. Because of the advance payments under contracts the consideration for which has failed, there may be found reasonable grounds for classification to save the Company from the necessity of returning such payments pro tanto, with a reduced rate for a reasonable time to amortize the unearned portion of the advance payments with interest.

3. All that the Court meant by its decision was what it said, namely, that the order of April 26, 1922, in so far as it affects the petitioners is annulled.

4. The Commission in the performance of its duty and guided by the decision of the Court will no doubt make such orders as are just and reasonable and within its powers.

5. The rehearing sought is unnecessary; it would unduly burden the Court and delay the Commission in the performance of their respective duties, and it should be denied.

(Dated January 31, 1923. Signed by the attorneys for the petitioners.)

Authorities on Jurisdiction Relied on by Petitioners on Rehearing

(Addressed to the Chief Justice and Associate Justices of the Supreme Court of California.)

Regardless of any contention based on the language of Section 67 of the Public Utilities Act as a limitation on the power of this Court to annul an order of the Railroad Commission on the ground of discrimination, the order on which this review was granted must be annulled because it is in contravention of the Constitution of the [fol. 155] United States.

So much of Section 67 of the Public Utilities Act as applies to this case is as follows:

"* * * the applicant may apply * * * for a writ of review * * * for the purpose of having the lawfulness of the original order or decision * * * inquired into and determined. * * * The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination. * * *."

Public Utilities Act, Section 67.

Three rights of the petitioners under the Constitution of the United States are violated unless the order be annulled:

1. The obligations of their contracts are impaired by a law passed after the contracts were made;

2. The impairment of their contracts makes their lands subject to a lien to which they never agreed, and requires of them payment for the use of water not served, hence their property is taken without due process of law; and

3. By reason of the impairment of their contracts they are classified as consumers upon no real distinction of the character of the service, and know as citizens of the United States they are denied the equal protection of the laws.

1. The Reserved Power of the State

The State has power, through the Railroad Commission, to regulate and control the use of public waters; and, incidentally to fix rates, and from time to time to change rates for the use so controlled and [fol. 156] regulated by the State. Section 1 of Article XIV in terms declared that water appropriated as this water was, constituted a public use, and provided that:

"The use * * * is * * * subject to the regulation and control of the State in the manner to be prescribed by law."

This power to regulate and control the use of water dedicated and the incidental power to fix rates when exercised is superior to any contract, in opposition to every contract, and operates equally upon all such waters and their use, and equally upon all consumers, regardless of the existence or non-existence of any prior contract controlling the use or fixing rates.

Broadly speaking, the contracts which were entered into before the Public Utilities Act or Section 23 of Article XII of the State Constitution was adopted, were in the familiar form of such contracts. They provided for water rights, appurtenant to the land described in them, and for right of way to maintain and operate ditches. Some provided for an initial payment based on the acreage described. All these provisions are severable from the reciprocal obligations involved in this proceeding, and none of these is affected by the decision of the Commission. The only other obligations involved are three:

First. The company undertook to deliver to the land of the consumer each year for irrigation purposes, a fixed quantity of water for each 160 acres described in the contract.

Second. The consumer agreed to pay to the company each year a sum of money equal to the total number of acres described in the contract multiplied by a very low rate per acre.

Third. The consumer agreed that "all sums which may become due under the contract," should be and become a lien on all the land described in the contract, and that the lien might be foreclosed as other liens, with an added attorney's fee.

There was no agreement, express or implied, that the contracts should be changed or their obligations be impaired under the reserved power to regulate and control the use and incidentally to fix rates. [fol. 157] The State had, and still has, power to change the character and the amount of the use, and to change the rates for the use so requested, but the power to change or to fix rates for the use in the manner prescribed by law does not include the power to change the contracts in any particular.

Until the exercise of the power to regulate and control the use if either party to the then operative contract had defaulted, the other party would have sued on the contract. After the State exercised the power of regulation and control by fixing rates for the use, if

either party should default in payment or in service, recourse in the first instance would be to the Commission, and if suit were brought it would not be on the contract, but under the law.

II. Any Change in the Terms of the Contract is Within the Meaning of the Words "Impairing the Obligation of Contracts"

In the Dartmouth College case in the concurring opinion of Mr. Justice Washington, he said:

"And can it be seriously contended that a law which changes so materially the terms of a contract does not impair it? In short, does not every alteration of a contract, however unimportant, even though it be manifestly for the interest of the party objecting to it, impair its obligation? If the assent of all the parties to be bound by a contract be of its essence, how is it possible that a new contract, substituted for, or engrafted on another, without such assent, should not violate the old charter?

* * * * * * *

"In all respects in which the contract has been altered without the assent of the corporation its obligations have been impaired; and the degree can make no difference in the construction of the above provision of the constitution."

Dartmouth College v. Woodward, 4 Wheat. 518-663-655; 4 Law Ed. 665-666.

III. By Neither Constitutional Amendment nor Legislative Act Could the State Impair the Obligations of the Contract; nor Could the Same End Be Attained by Judicial Interpretation of Either the Legislature or the Contract.

[fol. 158] "It is well settled by the adjudications of this Court, that a state can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibition they are substantially the same thing."

White v. Hart, 13 Wall. 685, 20 L. Ed. 685-688.

"A valid contract cannot be abrogated by the adoption of a new constitution any more than it can be by the enactment of a law by the legislature."

Ede v. Knight, 93 Cal. 159-161.

"A state can no more impair an existing contract by a constitutional provision than by a legislative act; both are within the prohibition of the National Constitution."

Gunn v. Barry, 15 Wall. 610, 21 L. Ed. 212-215.

"A constitution can no more impair the obligation of a contract than ordinary legislation can."

Town of Concord v. Portsmouth Savings Bank, 92 U. S. 625, 23 L. Ed. 628-631.

"This court has always ruled that if a contract when made was valid under the constitution and laws of a state as they had been previously expounded by its judicial tribunals and as they were understood at the time, no subsequent action by the Legislature or the Judiciary will be regarded by this court as establishing its invalidity."

Olcott v. Supervisors of Fond du Lac Co., 16 Wall. 690, 21 L. Ed. 382-386.

"A contract having been entered into between parties valid at the time, by the laws of the State, it is not competent even in its legislature to pass an act impairing its obligation, much less could any decision of its courts have that effect."

Chicago v. Sheldon, 9 Wall. 50, 19 L. Ed. 594-597.

"The sound and true rule is that if a contract when made was valid by the laws of the state as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law."

Gelpecke v. City of Dubuque, 1 Wall. 175, 17 L. Ed. 520-525.

"The contracts being then complete and operative, the Legislature cannot, by a subsequent act, impair its obligation by requiring the [fol. 159] performance of other conditions, not required by the law of the contract itself * * *. The power to impose conditions after the contract is once complete and perfect, is nothing but the power to impair its obligation, and this the constitution has prohibited."

Robinson v. Magee, 9 Cal. 81-84-85.

IV. Where the Government Exercises a Power Reserved in it by Law Contracts Made in Contemplation of That Law No Longer Control Any Matter Within the Reserved Governmental Power

In regard to interstate commerce under the Constitution of the United States the continuing power existed in the Federal Government to control and fix rates. Until that sovereign power was exercised carriers might and did enter into lawful contracts with individuals concerning interstate traffic. Immediately the Federal Government assumed to act under its continuing power every such contract was superseded as to future dealings between the parties, whose future dealings, thereafter, were fixed, not by prior contracts, but by the provision of the law. This legal situation is clearly shown in a case where the New York Central Railway contracted with one Gray to prepare for it a map of its lines as an exhibit at the Columbia International Exposition. The agreed price for the map was $750, of which $150 was paid in cash and the balance was to be paid in transportation to be given to Gray when and as he required it between New York and his home in Pennsylvania. Before the transportation account had been satisfied the Federal Government under the Hepburn Act declared it unlawful for any interstate carrier to

furnish transportation for any part of an interstate journey in payment for services or for any other consideration except a regular fare paid in money. The railroad company declined to continue to furnish transportation under the old contract and Gray sued. The case went to the Supreme Court of the United States, which decided that the Railroad Company acted strictly in accordance with the law in refusing to furnish transportation in performance of the prior contract, but the Court said:

[fol. 160] "It by no means follows that it" (the Railroad Company) "could refuse to make full compensation in money for the unpaid purchase price of the map."

N. Y. C. & H. R. R. Co. v. Gray, 239 U. S. 583; see note Louisville etc. Co. v. Crowe, 49 L. R. A. (N. S.) 848.

V. The Constitutional Protection Is Properly Set Up and Claimed

In a case decided in 1899 it became necessary to construe a contract and to construe a subsequently passed statute, the question being whether the contract had been impaired. The lower Court disposed of the case upon a construction of the contract which brought it into apparent harmony with the subsequent statute, and the Supreme Court said:

"Such construction is no less a Federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant would not impair it."

After stating the several contentions made by the party relying on the constitutional protection, the Court continued:

"These are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of McCullough v. Virginia, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question" (citing cases).

The opinion, which was delivered by Mr. Justice Brown, then continued:

"To the argument that the Federal right was not 'specially set up and claimed' in the language of Revised Statutes, section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here:

(1) 'Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity;'

(2) 'Where is drawn in question the validity of a statute of, or an [fol. 161] authority exercised under, any statute on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity;'

(3) 'Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up and claimed by either party under such Constitution, statute, commission, or authority.'

There is no doubt that under the third class the Federal right, title, privilege, or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction. Spies v. Illinois, 123 U. S. 131, 181 (31: 80, 91); French v. Hopkins, 124 U. S. 524 (31: 536); Chappell v. Bradshaw, 128 U. S. 132 (32: 369); Baldwin v. Kansas, 129 U. S. 52 (32: 640); Leeper v. Texas, 139 U. S. 462 (35: 225); Oxley Stove Co. v. Butler County, 166 U. S. 648 (41: 1149).

But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. Miller v. Nichols, 4 Wheat. 311 (4: 578); Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245 (7: 412); Satterlee v. Matthewson, 2 Pet. 380, 410 (7: 458, 468); Fisher's Lessee v. Cockerell, 5 Pet. 248 (8: 114); Crowell v. Randell, 10 Pet. 368 (9: 458); Harris v. Dennis, 3 Pet. 292 (7: 683); Farney v. Towle, 1 Black, 350 (17: 216); Hoyt v. Shelden, 1 Black, 518 (17: 65); Mississippi & M. Railroad Co. v. Rock, 4 Wall. 177 (18: 381); Furman v. Nichol, 8 Wall. 44 (19: 370); Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254 (35: 1004).

The case under consideration falls within the second class (and as it appears from the record and from the opinion of the court which may be examined for that purpose (Krieger v. Shelby R. R. Co., 125 U. S. 39 (31: 675),) that the question was presented and decided, that the act of 1892 affirming the validity of defendant's contract with the board of directors of the state penitentiary did not impair the obligation of plaintiff's contract, evidenced by the act of 1887, because that act properly construed conveyed no exclusive rights, we think the Federal question sufficiently appears."

Columbia, etc. Power Co. v. Columbia Electric etc. Company, 172 U. S. 475, 487-488; 43 Law Ed. 525-526.

[fol. 162] In this case the federal question is clearly presented on the record:

"Another group of consumers holding contracts similar to those just referred to take a totally different position and urge that as to them, applicant is a public utility and the former action of the Commission, fixing rates different from those specified in their contracts, has resulted in the complete abrogation of these contracts in all particulars. We think this contention is also unsound. It is well settled in this state that contracts of this sort are subject to revision. To the extent that the rates for water are changed by the orders of the Railroad Commission these contracts are modified or reformed but not wholly superseded or abrogated. Other provisions of such contracts may remain in full force and effect. Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 298.

The reason these consumers desire that their contracts be completely annulled is that the contracts contain a provision for continuous service of water for the entire acreage for which water was contracted, irrespective of whether water is or is not actually used on the lands covered by the contracts. In other words, they are required by their contracts to pay a certain amount per acre per year even though part of the acreage may remain uncultivated, and no water used. Under these contracts, on the one hand the company must hold itself in readiness to serve the entire acreage covered by the contracts, and hence is not free to dispose of, to any one else, the water necessary to do this, and on the other hand the consumers are required to pay for the full acreage involved, irrespective of whether the entire acreage be irrigated in each year.

In this connection it is urged that in the Decision of the Commission, No. 5277, 15 O. and O. R. R. C. 425-450, the provision requiring payment for acreage on which water was not actually used was set aside. However, we think a reading of the entire opinion in that case will not bear out this contention. The order itself provided for three distinct classes of rates:

1. A flat rate of consumers not holding contracts.

2. A measured rate to apply where meters were installed.

3. A flat rate for holders of contracts.

The order clearly shows that the contract holders were treated as a separate class of consumers and the Commission deemed that, except as to the change in rates, the contracts remained in full force and effect.

If the entire system were metered, as has been recommended by the Commission, and all water was paid for on a measured basis, a situation might be presented which would justify the elimination of the annual acreage charge on unirrigated lands. Under present conditions, however, we believe that this charge is justified, and the [fol. 163] Commission will not, therefore, prescribe a rate which will supersede this provision of the contract."

In re Sutter-Butte Canal Co., 21 C. R. C. 623-625.

In the opinion upon which this rehearing was granted it was said:

"The petitioners herein do not contend that the Sutter-Butte Canal Company and its predecessors through whom they claim to have received their water rights contracts had not taken on the character of a public utility from a period antedating their said contract, nor do they deny that their contract rights thereunder were not at all times subject to control and regulation by the state, under the provision of the Constitution declaring that 'the use of all water now appropriated or that may hereafter be appropriated for sale, rental or distribution is hereby declared to be a public use and subject to the regulation and control of the state in the manner provided by law.' (Const. art. XVI, sec. 1.) They do, however, insist that their said water rights contracts were at the time of their creation, and at all times thereafter, valid and subsisting obligations, one of the main considerations for the making of which was the water rate which each of said contract holders was to pay thereunder, and that while these contract holders conceded that the Railroad Commission had been invested by the state with power of regulating and establishing rates for public utilities, it had no power in so doing to create another and different contract between said public utility and its contract water users; and they further contend that the Commission has no jurisdiction under or by virtue of its conceded power to regulate rates or authorize or establish rates which would be unequal and discriminatory as between the contract or non-contract water users of the said public utility whose areas of the land subjected to irrigation are the same.

As to the first of these contentions, it must be admitted by the petitioners herein as a necessary corollary to their concession to the effect that the Canal Company was at all times prior to and during the existence of their contracts a public utility, that the full authority vested in the state by the Constitution and by it reposed in the Railroad Commission to regulate rates, carried with it the power to change said contracts in so far as the proper exercise of the jurisdiction of the rate-making body might require such change. The contracts thus affected would be neither abrogated nor superseded as to the provisions thereof unaffected by such changes in their provisions as were necessary in the course of such rate regulation. The contracts of these petitioners as to some of these provisions have obviously not been abrogated by the orders of the Commission thus far made; as, for example, the provision therein that the water rights thus conveyed are appurtenant to and run with the land. (1) The only virtue in this contention of the petitioners springs from its relation to their second contention, which is, that the Railroad Commission in the exercise of its jurisdiction over said contracts for the purpose of rate regulation has no power to create or continue discriminations as to rates between consumers of water of [fol. 164] the Canal Company in respect to the acreage basis upon which such rates should be calculated."

Live Oak Water Users' Association et al. v. Sutter-Butte Canal Co., 65 Cal. Dec. 69-71.

VI. Law v. Railroad Commission, 184 Cal. 737

"There is no longer any question as to the power of a state to fix rates for a public utility service which will supersede rates for such service previously fixed by private contract between the consumer and the company. It has been conclusively settled that the interference with private contracts by the state regulation of rates is but a legitimate effect of a valid exercise of the police power which neither impairs the obligation of a contract nor deprives of property without due process of law. (Atlantic Coast Line Ry. Co. v. Goldsboro, 232 U. S. 548, 558, (58 L. Ed. 721, 34 Sup. Ct. Rep. 364; see also, Rose's U. S. Notes); Union Dry Goods Co. v. Georgia Public Service Corp., 248 U. S. 372. (9 A. L. R. 1420, 63 L. Ed. 309, 39 Sup. Ct. Rep. 117); Southern Pac. Co. v. Spring Valley Water Co., 173 Cal. 291. (L. R. A. 1917E, 680, 159 Pac. 865); Limoneira Co. v. Railroad Com., 174 Cal. 232, (162 Pac. 1033). It is immaterial that petitioner's contract was entered into prior to the enactment of the present Public Utilities Act and the amendment thereto by which steam-heating service was included as a utility to be regulated. If the service contracted for was devoted to public use (Allen v. Railroad Com., 179 Cal. 68, (8 A. L. R. 249, 175 Pac. 46)), the contract for the service was subject to the exercise of the police power and, the state having elected to confer upon the commission the power to prescribe uniform rates for the service, petitioner cannot complain if the exercise of this power results in the practical annulment of his private contract fixing compensation for a public service. (Producers' Transp. Co. v. Railroad Com., 251 U. S. 228. (64 L. Ed. 239, 40 Sup. Ct. Rep. 131).)" pp. 739-740.

"There remains the claim of petitioner that, if the Great Western Power Company is to retain its right given by the contract to use agencies and appliances belonging to him, the order will operate to deprive plaintiff of the use, of his property without compensation and, by compelling him in effect, to pay a higher rate than other consumers, create the discrimination it purports to abolish. If the order attempted to change the rate paid by petitioner and, at the same time, give the power company the right to continue to use the agencies and appliances of petitioner under the contract, then it would, indeed, exceed the jurisdiction of the commission by depriving petitioner of his property without compensation and due process of law. This, however, is not the effect of the order, which simply does what the law permits, namely, fixes the rates to be paid by the consumer, and, therefore, nullifies the compensation fixed by the contract. It follows, of course, in view of the change effected [fol. 165] by the order in such an important part of the contract, that petitioner will have the right under the law to rescind the contract, and prevent further use of his property by the former company, except for compensation properly determined. (See Newport v. Temescal etc. Water Co., 149 Cal. 538, (6 L. R. A. (N. S.) 1098, 87 Pac. 372); Miller & Lux v. Enterprise etc., Co., 169 Cal. 415, 426, (147 Pac. 567)." pp. 741-742.

In the present case the order of the Commission creates a lien in an amount for which the parties did not contract, and it imposes a condition to pay for service each year whether any water is served or not in any year.

The parties did not agree that the state should change their contracts in any manner. The consumer agreed that in consideration of the benefit of the continuance of the delivery of a fixed quantity of water at a fixed low rate, the water company might have a lien upon all his land for the amount to which he agreed. He agreed that the state might take over the whole subject matter of the amount of the use of water and determine when and how and how much he was to receive, and when and how and how much he was to pay for the use of the water when the state in the manner prescribed by law exercised the reserved right which was paramount and in opposition to his agreement in those regards.

There was nothing in Section 1 of Article XIV about impressing a lien on his land for water rates to be paid by him, not under the contract but to be fixed by law, and there is nothing in any law which has been or which could be passed providing for such a lien, at least as applying to the contract holders' land and not applying to the land of other consumers. All that these contract holders agreed to in regard to liens was as to amounts becoming due under the contracts.

The contracts were not abrogated or rendered any less valid by the adoption of the Public Utilities Act and Section 23 of Article XII of the Constitution of California, because the state had no power through any of its agencies to produce such results. They are as valid as inviolable as they ever were. They provided for the quantity of water and the price to be paid or imposed as a lien, each [fol. 166] year, upon the condition subsequent, that the state might by law fix the character and amount of water use and the price to be paid for such public use. On the happening of the contingency, the contractual provisions in those particulars simply became inoperative. As between the parties in all other respects the contracts are unaffected. The condition is exactly that shown in an Interstate Commerce case referred to in the petition for the writ of review.

VII. The Diminution of the Value of Property Constitutes a Taking under the XIV Amendment; any Taking is Within its Protection

"It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful

for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be 'Obsta Principiis.'"

Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746-752.

"The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

Missouri Pac. Ry. v. Nebraska, 164 U. S. 403-417.

"This court, referring to the Fourteenth Amendment has said: 'Can a state make anything due process of law which by its own legislation, it chooses to declare such?' To affirm this is to hold that the prohibition to the states is of no avail or has no application where the invasion of private rights is affected under the forms of state legislation." (Davidson v. New Orleans, 96 U. S. 97.)

Chicago-Burlington, etc. R. Co. v. Chicago, 166 U. S. 226-235, 41 L. Ed. 979-984.

[fol. 167] "It has been wisely and aptly said that this is a government of laws and not of men; that there is no arbitrary power located in any individual or body of individuals, but that all in authority are guided and limited by those provisions which the people have through the organic law declared shall be the measure and scope of all control exercised over them."

Cotting v. Godard, 183 U. S. 79-84, 46 L. Ed. 92-99.

The question of discrimination is itself a federal one, and under Section 67 of the Public Utilities Act is to be determined by the Court, notwithstanding the words of the last clause on which respondents rely.

VIII. "Due Process of Law" under the XIV Amendment Prohibits Burdens Being Laid on One Group of Persons under the Pretense of Classification

"* * * 'Due process of law,' is denied when any particular person of a class or of the community is singled out for the imposition of restraints or burdens not imposed upon and to be borne by all of the class, or of the community at large, unless the imposition or restraint be based upon existing distinctions that differentiate the particular individual of the class to be affected from the body of the community."

State v. Ashbrook (Mo.), 55 S. W. 626-632.

"The question always is, when a classification is made, whether there is any reasonable ground for it or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural."

Nicol v. Ames, 173 U. S. 509-522, 43 L. Ed. 786-794.

"But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service must have some reasonable relation to the amount of difference and cannot be so great as to produce an unjust discrimination."

Western Union Tele. Co. v. Call Publishing Co., 181 U. S. 92-100, 45 L. Ed. 765-769.

[fol. 168] "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court:—Yick Wo v. Hopkins, 118 U. S. 356, 369. 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

Gulf, Colo. & S. Fe Ry. Co. v. Ellis, 165 U. S. 150-159; 41 L. Ed. 666-669.

"And Mr. Justice Brewer in Gulf, Colorado and Santa Fe Railroad Company v. Ellis, 165 U. S. 150, after a careful consideration said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment and that in all cases it must appear not only that a classification has been made but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

Magoun v. Ill. Trust & Savings Bank, 170 U. S. 283-294; 42 L. Ed. 1037-1043.

Mr. Justice Olney, speaking for this Court in Butte County Water Users Association v. Railroad Commission, in 185 Cal. 218, at 224, in answer to the contention that a rate payer had vested right to water for irrigation, said:

"It is a contention directly contrary to the principle upon which Leavitt v. Lassen Irrig. District (157 Cal. 82) was decided, and wholly opposed to the fundamental principle that a public utility must hold itself out as ready to serve and must serve the public or its portion of the public without discrimination or preference other than such as corresponds to difference in the value or cost of service rendered."

As was so clearly shown by the opinion of this Court, the decision of the Commission placed a different burden upon contract consumers than that upon other consumers of this public use of water upon no other basis of classification than that the first group were contract holders.

[fol. 169] The non-contract holders must specify each year the acreage for which they desire the Company to reserve water for that year, and they must pay on the basis of that acreage regardless of what they actually irrigated. (Commissioner's Petition, p. 17.)

"The only advantage the non-contract holders have over the contract holders is that by designating from year to year the amount of land for which they wish water reserved, they exercise a slightly greater freedom of choice than the contract holders whose land is designated permanently in the contract."

Commission's Petition, p. 18.

While this statement both answers the contention of the Company and shows the discrimination upon which the order was annulled, it is misleading in two particulars. The "slightly greater freedom of choice" means that the non-contract owner of 160 acres of land may designate this year 40 acres, next year 80, and the next year none of his land, and he will pay on acreage rates for 40, 80, or no acres to the Company, while his neighbor contract owner of 160 acres will pay acreage rate on 160 acres for each of the three years for exactly the same use.

In addition to this slightly greater freedom of choice, the contract holder under the decision who may own 160 acres of land has all that land subjected to a lien at the increased rates per acre for the entire 160 acres whether any water is used by him or not or wanted by him or not for irrigation use in any year while his non-contract neighbor owning a similar 160 acres is not burdened with a lien upon his land for the water which he actually uses or desires to use for one irrigation season, much less is his non-irrigated land burdened with a lien for water service not made to it.

(Dated May 12, 1923. Signed by the attorney for petitioners.)

[fol. 170] Reply of Sutter-Butte Canal Company to Authorities on Jurisdiction Relied on by Petitioners

It is contended by counsel for the petitioners in this proceeding for review of the order of the Railroad Commission that the order must be annulled because "the obligations of their contracts are impaired by a law passed after the contracts were made."

It is difficult to follow counsel's argument or to determine his position in regard to the reserved power of the State to regulate public utilities. In numerous places in the various briefs filed on behalf of the petitioners it is conceded that the State has the power, acting through the agency of the Railroad Commission, to fix rates for a public utility service which will alter the rates fixed by prior contracts; decisions of this Court and of the Supreme Court of the United States upholding this power are cited by petitioners' counsel; extracts are quoted therefrom to the effect that no constitutional rights are impaired by such orders of the Railroad Commission; yet it seems

to be contended that constitutional rights are impaired by such orders! This Court is so familiar with the decisions on this subject that it is not necessary for us to devote further space thereto.

It is said by counsel for the petitioners that "the impairment (sic) of their contracts makes their lands subject to a lien to which they never agreed."

The contracts entered into by petitioners provide for liens on their lands for all sums which may become due by them under their contracts. In its discussion of the effect of a change of rates upon the petitioner's contracts the Railroad Commission cited Southern Pacific Company v. Spring Valley Water Co., 173 Cal. 298, to the effect that the contracts were subject to revision by the Railroad Commission in respect to the rates fixed therein, and stated that "other provisions of such contracts may remain in full force and effect." The Railroad Commission did not state what contract provisions may remain in effect, other than the provisions for continuous service of [fol. 171] water for the entire acreage described in the contracts and for the payment of the rates annually on that acreage. The Railroad Commission did not order or purport to order anything about liens on the lands of the petitioners.

The power of the Railroad Commission to change the contract rate cannot be questioned because of the provision for a lien in the contracts.

Any proceeding which may be instituted by the Canal Company to enforce any lien claimed by it will necessarily have to be by action in Court, and the validity thereof will then be decided by the Court.

Law v. Railroad Commission, 184 Cal. 737.

That question is not involved here. Furthermore, in their application to the Railroad Commission for a rehearing the petitioners did not claim that the Railroad Commission had, in its decision or order, dealt or purported to deal with the contract provision for a lien on the lands of the petitioners, or that the decision or order of the Railroad Commission was considered to be unlawful because of any relation to each other of that provision in the contract and of the decision or order. No claim against the validity of a decision or order of the Railroad Commission can be urged in this Court which is not first set forth specifically in an application to the Railroad Commission for rehearing.

Public Utilities Act, Sec. 66; San Leandro v. Railroad Commission, 183, Cal. 229.

It is also said by counsel for petitioners that "the impairment of their contracts * * * requires of them payment for the use of water not served." We assume that counsel here refers to the claim made by the petitioners that the Railroad Commission could not lawfully authorize a charge to be made against any consumer for water contracted or applied for but not used upon the whole acreage described in the contract or application. The Railroad Commission did not authorize any charge to be made for water which the Canal Company was not able and ready to serve.

[fol. 172] The validity of the order of the Railroad Commission authorizing the Canal Company to charge for water contracted or applied for but not used upon the whole acreage described, is discussed in our petition for rehearing (pp. 12-23). No case is cited by opposing counsel to support the contention that the order is unlawful in this respect.

It is further said by counsel for petitioners that "by reason of the impairment of their contracts (sic) they are classified as consumers upon no real distinction of the character of the service."

It is true that the Railroad Commission fixed a rate for the contract holders and another rate for applicants for water, the rate for the former being expressly made lower in consideration of the $10 initial or advance payment made by them. What complaint did petitioners make to the Railroad Commission relevant to the validity of this classification? In their application to it for a rehearing they said that the Railroad Commission erred in making the statement that the petitioners urged that their contracts had been completely abrogated by the first order made by the Railroad Commission in 1918 changing the contract rates; that the Railroad Commission also erred in making the statement that under the contracts the Canal Company must hold itself in readiness to serve the entire acreage covered by the contracts, and the consumers are required to pay for the full acreage involved irrespective of the acreage irrigated; that it is beyond the power of the Railroad Commission to fix rates to be charged against any person for any utility service in excess of the service rendered; and that the Railroad Commission also erred in making the statement that in 1918 the contract holders were treated by it as a separate class of consumers, and that it deemed that, except as to the change in rates, the contracts remained in full force and effect. In their argument accompanying their application for rehearing it is said that in fixing Schedule 3 the Railroad Commission has imposed upon the contract holders, as a separate class, "rates which are as to them discriminatory, unfair and unjust as compared with rates of other classes."

[fol. 173] As the rates fixed in Schedule 3 are lower than the other rates, and the petitioners enjoy these lower rates, it is not apparent how the petitioners are thereby unfairly discriminated against, and, indeed, they nowhere point out how they are thereby discriminated against. But when this Court rendered its opinion in this proceeding it erroneously assumed something which did not exist, viz., that the Railroad Commission had provided that the rates to be charged against the non-contract consumers of the Canal Company "should be calculated upon the amount of their respective holdings actually subjected to irrigation in each particular year," regardless of the areas described in their applications to the Company, whereas the charges against the contract holding consumers were to be calculated upon the areas described in their contracts regardless of the acreage actually subjected to irrigation.

What do petitioners say now in support of their claim that the Railroad Commission improperly classified the petitioners or discriminated against them? They say this:

"As was so clearly shown by the opinion of this Court, the decision of the Commission placed a different burden upon contract consumers than that upon other consumers of this public use of water upon no other basis of classification than that the first group were contract holders."

It is unnecessary for us to repeat the showing made in our petition for rehearing respecting the error into which this Court fell in its interpretation of the order of the Railroad Commission, or to repeat the arguments heretofore made on behalf of the Railroad Commission and of the Canal Company in support of the Commission's power to classify the Company's consumers as the Commission did, and of its power to fix the rates for the two classes of consumers, and of the lawfulness of the order of the Railroad Commission in these respects.

The statement that the non-contract holders must specify each year the acreage for which they desire the Company to reserve water for that year is also erroneous. Applications once made and accepted [fol. 174] stand good and continue in effect until the applicant gives notice of discontinuance to the Company. This notice must be given not later than January first of the year in which discontinuance of service is desired.

San Leandro v. Railroad Company, 183 Cal. 229, has been cited in support of the validity of a "ready to serve" or "stand by" charge. In Central Iron & Steel Co. v. City of Harrisburg (Pa.), 114 Atl. 258, a "ready to serve" charge against consumers for water furnished by meters, and an annual flat rate or charge against other consumers, payable in advance, were unheld as valid. The Court said:

"It is complained that, as fixed, discrimination resulted between customers employing meters and those supplied under flat rates. The exaction of such a claim, if general, has been frequently approved by the Public Service Commission without challenge as to its propriety. In effect, it is a minimum payment demanded of patrons who desire to be placed in position to take advantage of the service at their convenience, whether actually using the water or not. The municipality cannot discriminate in imposing this or any other rate charge, but it may make reasonable classifications * * *. And we cannot say that this rule has been violated in the present instance. The annual customer pays a fixed sum, whether he uses the water or not. The meter patron has at all times a supply at hand for service, but pays only for such quantity as his needs or convenience may dictate. It may be that nothing would be consumed in a particular water period. A charge for such a service is not unfair, and the classification which has been made by the Council cannot be said to be arbitrary, but is based on sufficient reason, and should be sustained."

We respectfully submit that the order of the Railroad Commission should be affirmed.

(Dated May 16, 1923. Signed by attorneys for respondent Sutter-Butte Canal Company.)

[fol. 175] MEMORANDUM OF AUTHORITIES OF RESPONDENT RAILROAD COMMISSION ON REHEARING

(Addressed to the Chief Justice and Associate Justices of the Supreme Court of California.)

The argument of petitioners on rehearing may be characterized as a warning against the impairment of contracts. It has been urged that "three rights of the petitioners under the Constitution of the United States are violated." All three, it appears, are based upon the impairment of contracts which petitioners urge can be avoided only by the annulment of the order under review. In the interest of brevity, we will discuss the three Constitutional rights referred to by petitioners in the order in which they are presented in the Memorandum of Authorities relied on by their Counsel on rehearing:

The first right mentioned is: "The obligations of their contracts are impaired by a law passed after the contracts were made." We are constrained to believe that Counsel for petitioners has failed to appreciate the full force of this statement. Had he done so, he certainly would not have cited in support of his contention the decision of this Honorable Court in the case of Law vs. Railroad Commission, 184 Cal. 737, nor quoted therefrom the following: "It is immaterial that petitioners contract was entered into prior to the enactment of the present Public Utilities Act and the Amendment thereto by which steam heating service was included as a utility to be regulated." We respectfully submit that this conclusive pronouncement of the Court, together with an equally definite statement to like effect in Producers Transportation Company vs. Railroad Commission, 251 U. S. 228, is directly contrary to the broad language of petitioners first proposition. The only "law passed after the contracts were made" which could be referred to as having "impaired" the obligations of petitioners' contracts, is the Public Utilities Act. This statute does not purport to take away any con-[fol. 176] tract rights. Its validity has been sustained many times. We do not believe that the petitioners have pointed out in this case any peculiar or different circumstances which indicate that the Public Utilities Act in this case operates otherwise than as a valid exercise of the police power of the State to regulate public utilities.

Petitioners' second proposition is:

"The impairment of their contracts makes their lands subject to a lien to which they never agreed, and requires of them payment for the use of water not served, hence their property is taken

without due process of law." Petitioners here refer to "impairment of their contracts" as though it were an established fact. If "impairment" by law is intended, that proposition has been answered. If, however, petitioners mean that the order of the Commission made pursuant to the Public Utilities Act operates to impair their contracts we must take issue with them on the question of fact.

The Commission's order does one thing. It fixes rates. It does not prescribe how these rates shall be collected, nor what, if any, lien may be foreclosed. It neither purports to nor does it create any lien upon petitioners lands. Here again, with all respect, we must express our conviction that the argument which petitioners make is inconsistent with the authorities which they have cited. In this instance we refer to the italicized quotation from the decision in the Law case which appears at the bottom of page 19 of petitioners' Memorandum, wherein it is said:

"If the order attempted to change the rate paid by petitioner and, at the same time, give the power company the right to continue to use the agencies and appliances of petitioner under the contract, then it would, indeed, exceed the jurisdiction of the Commission by depriving petitioner of his property without compensation and due process of law. This, however, is not the effect of the order, which simply does what the law permits, namely, fixes the rates to be paid by the consumer, and, therefore, nullifies the compensation fixed by the contract."

The Commission's order in the case under review does nothing more nor less than the order which was affirmed in the Law case.

As a third proposition, petitioners contend:

[fol. 177] "By reason of the impairment of their contracts they are classified as consumers upon no real distinction of the character of the service, and know as citizens of the United States they are denied the equal protection of the laws."

We are unable to see how any possible classification has been made by reason of any possible impairment of contracts. The Commission's order did undoubtedly classify the consumers of the Sutter Butte Canal Company as permanent consumers and year to year consumers. The substantial reasons and basic for this classification was fully pointed out in the Petition for Rehearing and in the oral argument. We believe it is unnecessary to comment further upon that point in this memorandum.

The position taken by respondent, Railroad Commission, as to the contracts between the Canal Company and its consumers and the effect thereon of the rate-fixing orders of this Commission has been fully presented in the brief and the petition for rehearing heretofore filed. The effect was therein made to express a view consistent with the principles laid down by this Court in the cases of Southern Pacific Company vs. Spring Valley Water Company, 173 Cal. 291 and Palermo L. & W. Company vs. Railroad Commission, 173 Cal. 380.

We respectfully submit that as between the Canal Company and its consumers who have heretofore entered into contracts which contain provisions relating to a lien upon the consumers' lands, any disputes concerning such contractual rights or obligations are not properly within the issues of the case under review and are not properly before the Court for determination. The Commission's reference to the contracts, in so far as was deemed necessary to properly classify the consumers for rate-fixing purposes, did not place in issue all of the contractual rights which might arise therefrom. The fact of the existence of the contracts and of the insistence of some of the consumers upon their rights thereunder could not be overlooked in the fixing of the rates. But beyond that, the Commission was not called upon to go and did not go.

[fol. 178] In conclusion, we desire to call attention to the point urged by respondent in the oral argument, that petitioners, not having urged as a ground for rehearing before the Commission, that the rates in question are discriminatory, could not be heard on that score in this judicial review.

Public Utilities Act, Section 66.

San Leandro v. Railroad Commission, 183 Cal. 299, 237.

(Signed by the attorneys for the Respondent Railroad Commission.)

The foregoing summary is in accordance with the stipulation concerning the same under paragraph 6 of the Joint Præcipe and Stipulation in this case and for all purposes of the Writ of Error in the Supreme Court of the United States in this case said summary is full, true and correct.

Dated this 5th day of May, 1924.

F. S. Brittain, Attorney and Solicitor for Petitioners in Error.
Hugh Gordon, Carl I. Wheat, Attorneys and Solicitors for Defendant in Error Railroad Commission of California.
Devlin & Brookman, Isaac Frohman, Attorneys and Solicitors for Defendant in Error Sutter-Butte Canal Company (a Corporation).

[fol. 179] IN SUPREME COURT OF CALIFORNIA

[File endorsement omitted]

[Title omitted]

ORDER VACATING JUDGMENT—February 6, 1923

Upon petition for rehearing the judgment of the court heretofore entered herein is hereby vacated and set aside and the cause ordered submitted to the court in Bank.

Dated February 6, 1923.

Wilbur, C. J.; Lawlor, J.; Lennon, J.; Waste, J.; Myers, J.; Kerrigan, J.

[fol 180] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

OPINION—September 21, 1923

Application for certiorari to review an order of the Railroad Commission of California regulating water rates. Order affirmed.

On rehearing (65 Cal. Dec. 69).

For Petitioners: F. S. Brittain, T. C. Nelson.

For Respondent Railroad Commission: Hugh Gordon, William W. Clary.

For Respondent Sutter-Butte Canal Company: Devlin & Brookman, Henry Ingram.

This court had occasion once before to outline the facts of the instant case, and for the purposes of the present consideration it adopts its former statement of facts with some modifications.

By this proceeding petitioners seek to have reviewed and annulled a certain order and decision of the Railroad Commission, given and made on April 26, 1922, with relation to the water rates of the Sutter-Butte Canal Company, in so far as the said order and decision of the Commission affects and undertakes to regulate certain water rates payable by petitioners as customers of the Canal Company in alleged violation of law. The individual petitioners herein, and also those persons who constitute the membership of the several associations who are named as petitioners herein and for whom merely an oral appearance was entered and who introduced no evidence before the Commission with the exception of two, are landowners in the region supplied with water for irrigation purposes by the Canal Company, and as such landowners are either directly, or through their predecessors [fol. 181] in interest, the holders of contracts with such Canal Company or its predecessors, for the furnishing of water upon their respective parcels of land. No complaint is made as to the rates fixed by the order nor is the necessity of an increase in rates questioned. The sole question is whether or not these rates should be applied to the full acreage covered by the contracts or only to the acreage actually irrigated, assuming the contract holder does not desire to irrigate all the land covered by his contract. These contracts in at least six different forms were entered into at various times by the parties thereto prior to the year 1913. They differ somewhat as to the charge per acre for water and also in some instances as to the amount of the initial charge required by the water company at the time of making said contracts; but in other respects they are substantially the same and constitute a burden or servitude upon the waters of the Canal Company. Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291, 296; Palermo L. & W. Co. v. Railroad Commission, 173 Cal. 380, 385; Allen v. Railroad Commission, 179 Cal. 68). The water rights contracted for were to be appurtenant to each parcel of land and might not be sold except with the land. Said contracts provided further that all the covenants and conditions therein contained

should run with the land. The contractual rate per acre was to be computed upon the entire acreage of the individual tract to which the water right was made appurtenant, whether or not the land was all irrigated or susceptible of irrigation. The consumer was to construct lateral ditches for delivery and the water company was given rights of way over the consumer's land and was also given a lien upon the consumer's entire tract of land for defaulted payments for water. The contract parties operated under these contracts without disagreement for several years, during which period the water company largely extended its irrigation system so as to include among its consumers many persons who were not contract holders, but were merely consumers of water furnished by the water company in its capacity as a public utility. That the Sutter-Butte Canal Company was from its inception a public utility, supplying water for irrigation [fol. 182] uses, must be and is conceded by the petitioners (Butte County Water Users' Assn. v. Railroad Commission, 185 Cal. 218; King et al. v. Railroad Commission, 65 Cal. Dec. 65). This much may be regarded as an established fact and condition so far as the instant proceeding is concerned. In the year 1917 the Railroad Commission, upon application of the Canal Company, undertook to investigate, establish and fix general water rates for said Canal Company affecting all of the consumers of its water for irrigation, whether contract or non-contract users of said water. All of the parties hereto were parties to that proceeding. The Commission, by its order therein, made on the 25th day of March, 1918, fixed rates per acre for water affecting all such consumers, and in its decision so doing, provided that the water served thereunder might be charged for at the acreage rate or might be measured by meter and charged for that way. With that portion of the order which deals with meterage rates we are not concerned, but with that portion of the order which dealt with acreage rates by which the Commission divided the consumers of the Canal Company into two classes, those who held contracts and those who did not. The annual rate for contract holders was made somewhat lower than that for non-contract holders. The reason for this differentiation was explained by the Commission in its order as being that, since a large portion of the contract holders had paid initial charges in varying amounts per acre it would seem unfair that new consumers who had not made a similar advance should receive service at the same cost as those who had made such payment. With respect to the provision in the contracts that the holders thereof should pay water rates according to the acreage of each individual tract, whether the same was irrigated or not, the commission made no order or ruling which would have the effect of superseding or abrogating said contracts in that respect. The effect of the order of the Railroad Commission was that the increased rate established by it was as to contract holders less per acre than the rate fixed for non-contract customers. The contract holders were required, however, to pay such lower rate upon the basis of the entire acreage of their respective holdings while the non-contract customers were to pay the higher rate [fol. 183] upon the total acreage designated in the application of the consumer.

The foregoing order of the Commission went into effect shortly after the date of its entry and its rates were thereafter charged and collected by the water company as to all of its customers during the succeeding three years or over, and to the time when the subsequent order of the Commission, now under review, was made and put into effect. None of the contract water users of the Canal Company during that period took any proceedings looking to a review or annulment of said order, or otherwise attempted in any form to assert that any rights under the provisions of their contracts had been invaded by the Commission in making said order, with the exception that certain of these contract customers, upon the putting into effect of said order, protested against the Canal Company's interpretation of the same and offered to pay the company at the rate set forth in its said order as affecting them, for each year, according to the number of acres upon which each of said contract customers desired to use water for irrigation during that year, but the company at all times refused to accept said offer and demanded and received payment of the rates so established upon the entire acreage of each of said contract holders, who thereupon submitted to and paid said water rates according to the acreage of their respective tracts of land as provided in their said contract without further objection. On November 5, 1921, the Sutter-Butte Canal Company filed another application with the Railroad Commission asking for a general increase in its water rates. The Commission on April 26, 1922, after an exhaustive hearing and investigation, gave its decision and entered its order authorizing a further increase in rates for water service by said Canal Company which affected all its consumers. In its consideration the Commission took express cognizance of the contention of these contract water users that its previous order, as interpreted by the Canal Company, did, and that its present order would, operate to work a discrimination between contract and non-contract users by compelling the former to pay an increased acreage rate on the entire acreage of their respective tracts of lands covered by said contracts, whether the whole or any portion thereof was [fol. 184] irrigated or not. In dealing with said contention the Railroad Commission expressly held that the interpretation placed by the Canal Company upon its said former order was correct and in substance held that with the exception of its admitted power over the regulation of the water rates of said public utility, it had no power to abrogate or interfere with the obligations of said contracts. It accordingly, by its decision and order, made a general increase in the water rates of the Canal Company, substantially in the form of its previous order, but with the express ruling that as to the acreage of contract holders to be affected by such increase the provisions of their contracts should remain in full force and effect. The petitioners herein filed an application for rehearing before the Commission, which was denied, whereupon they instituted the present proceeding to annul said last-named order in the respect above indicated. The reply which the respondents made to petitioners' application brings before us the proceedings had before the Com-

mission upon both hearings, as well as the record in the proceeding which resulted in making the order of April 26, 1918.

The petitioners do not contend that the Sutter-Butte Canal Company and its predecessors through whom they claim to have received their water right contracts had not taken on the character of a public utility from a period antedating their said contracts, nor do they deny that their contract rights thereunder were not at all times subject to control and regulation as to rates by the state under article I, section 16, of the state Constitution.

(1) The Railroad Commission did not attempt to change, limit, modify or abrogate any of the provisions of said contracts. A decision on the question of liens, as well as other questions of a purely legal character, was reserved by the Railroad Commission for adjudication by the courts. (Law v. R. R. Comm., 184 Cal. 737.) Acting within its unquestionable jurisdiction it did increase the water charges by the adoption of a uniform rate scale which was made applicable to each and every acre owned by the contract holders. Its action in this particular was in strict accord with the system which [fol. 185] was agreed upon by the petitioners. The Railroad Commission could not have acted in any other way and kept within its jurisdiction. By what authority it could have done differently than it did, so far as total acreage of each individual contract holder was concerned, has not and cannot, we think, be shown. Petitioners impliedly, if not expressly, admit that if the contract holders had exercised their full rights and irrigated each acre of their lands without exception the objection based on unlawful discrimination would be removed. If, indeed, the number of acres which a consumer should choose to irrigate rather than the number upon which he contracted to pay a water rate is the criterion by which unlawful discrimintion is to be determined, then the failure or refusal of a non-contract holder to irrigate in any one year a single acre included in the total acreage designated in his annual application would bring about the very result petitioners complain of. By such a rule one would be excused from performing what he agrees to do and may do that which it pleases him to do, a basis too shifting to predicate unlawful discrimination upon.

The power of this court to review the orders and decisions of the Railroad Commission are expressly limited by constitutional provision. Section 23 of article XII of the Constitution provides: "Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any * * * canal, pipe line, plant or equipment, or any part of such * * * canal, pipe line, plant or equipment within this state * * * for the production, generation, transmission, delivery or furnishing of heat, light, water or power * * * either directly or indirectly, to or for the public * * * is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities shall likewise

be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to [fol. 186] fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby *declared to be plenary and to be unlimited by any provision of the Constitution* * * *." (Italics ours.)

Deriving its authority from the above constitutional source the legislature has provided, by section 67 of the Public Utilities Act, the limit of this court's jurisdiction and power as a reviewing body by the following provision: "* * * The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of California. *The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review;* such questions of fact shall include ultimate facts and the findings and conclusions of the commission on *reasonableness* and *discrimination*. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission * * *." (Italics ours.)

By section 17 (b) of said act it is again provided: "Except as in this section provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished * * * or for any service rendered * * * than the rates, tolls, rentals and charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time * * * nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or [fol. 187] privilege except such as are regularly and uniformly extended to all corporations and persons; provided, that the commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility."

(2) The above cited article of the Constitution and sections of the Public Utilities Act are conclusive upon the question that the Railroad Commission's decision and order in the instant case on the question of discrimination and classification is not subject to annulment by this court. But if we were vested with jurisdiction to correct or annul the decision it is by no means certain that we would do so upon the record presented and showing made. That there is a logical and natural ground for the classification made by the

Railroad Commission seems convincing. A great many of the contract consumers had, in various ways from the beginning of the utility's existence, aided financially and otherwise in the construction and maintenance of the irrigation system by liberal loans of money, advancements, donations of rights of way and by making initial payments aggregating large amounts for water rights as shown by the record in the instant case, as well as in former and other proceedings had before this court in which the affairs of this identical Canal Company were involved. It is true that any sums which became due for water service became a lien upon the lands and might be foreclosed as such, but this provision was a part of a contract freely entered into. In addition to the advantages here pointed out the contract holder's right to water was appurtenant to and ran with the land and continued as long as the corporate existence of the Canal Company lasted.

It is the claim of petitioners that under certain decisions of this court, notably Leavitt v. Lassen Irrigation Co., 157 Cal. 82; Limoneira v. Railroad Commission, 174 Cal. 232, and Butte County Water Users' Assn. v. Railroad Commission, 185 Cal. 218, contracts such as the one under consideration (and in the latter case the identical contracts) give neither party any right which is not subject to the power of the state, as the latter has unquestionable power to regu- [fol. 188] late and control public uses irrespective of the contractual relations of private parties. This knowledge was imputable to petitioners before they entered into their contracts. But whatever may be said for or against the contention that the contracts impressed upon the waters of the Canal Company were but mere naked easements which are non-effective and could offer no resistance to the state's right to control and pro rate said waters under the rule declared in Butte County Water Users' Assn. v. Railroad Commission, supra, the answer is that the owners of said easements enjoyed the right to be supplied with one cubic foot per second of water for each 160 acres of land unless by reason of a scarcity of the water supply, as pointed out in the last cited case, new consumers would suffer material loss if denied the privilege of sharing with the old consumers in an equal distribution of the entire water supply. The point we seek to make is that said water contracts are a thing of value and were of sufficient importance to receive the attention and consideration of the Commission in making the classification which it did make even though said contracts must yield to the exigencies of great public necessity, as was fully considered in the last cited case. It was there said: "A water company supplying water for irrigation has not the power to take on new consumers without limit. Its power to supply water is, of course, limited to the amount of its supply and when the demands of consumers upon it have reached this limit, it has no right to take on new consumers to the necessary injury of those it has." The value to the contractor of the right to have water appurtenant to his land is discussed by the decision in Palermo L. & W. Co. v. Railroad Commission, supra, and in other cases cited.

The Commission further found from the record before it that a

compliance with petitioners' request to relieve a large acreage from water-rate payments contrary to their agreements would have reduced the revenues of the Canal Company to a dangerous if not ruinous point and probably would have seriously crippled if not defeated plans for present and future developments that were essential to the welfare of all concerned. Whether or not petitioners used [fol. 189] upon their lands the full amount of water which they bound themselves to pay for, it was the duty of the Canal Company, nevertheless, to hold itself in readiness to supply the water when required. Without discussing the legal effect of these two last propositions they were entitled to receive and did receive consideration by the Commission in balancing the equities of the parties to this proceeding. The duty of the Canal Company to furnish the water which it agreed to furnish by its contract remains a continuing and enforceable obligation excusable only upon the happening of some such contingency as was pointed out in Butte County Water Users' Assn. v. Railroad Commission, supra.

The rights conferred upon petitioners by said contracts are regarded by them as being of value is well shown by their unwillingness to concede that said contracts were in anywise annulled or abrogated by the Commission's action.

In making the classification for the purpose of rate-fixing the Commission gave consideration to a number of important factors or elements which distinguished one class from the other. The contract holders paid an initial charge which the year-to-year customers were not required to pay and it was the judgment of the Commission that it was unfair that the new customers should receive service at the same cost as those who had made advance payments and were permanent consumers. A vast majority of the new consumers were growers of rice, an industry which had suddenly developed into favor and prominence, but which was in a speculative state. Rice growing required in some respects a different kind of service than was required for the production of other crops. They were classed as short term consumers but, like all of their class, were permitted to enter the class of the contract-holders by paying said initial or advance payments. It is clear that the purpose of classification was in the interest of equaling, as far as the situation would permit, the cost of carrying water upon the lands of all of the Canal Company's consumers. Petitioners have shown no violation of the provisions of section 19 of the Public Utilities Act which provides that no public [fol. 190] utility shall make or grant any preference or advantage to any corporation or person or subject any person or corporation to any prejudice or disadvantage or establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect as between classes of service. It will be noted that this section provides that the Commission shall have the power to determine any question of fact arising under said section.

We find nothing in the record by way of evidence which shows or tends to show that the classification made by the Commission in dealing with a complex situation was either unfair or unreasonable

as to the members of either class of consumers. On the contrary, there is much to show that the entire effort of the Commission was to compose and equalize an inharmonious situation brought about by various causes.

There is no claim made that the rates established by the Railroad Commission were confiscatory or oppressive. No design has been shown on the part of anyone to give any person an unlawful preference or unfair advantage over another or to indulge in an unlawful discrimination in any manner whatsoever. Not every discrimination or recognition of a ground of difference may be classified as unlawful. A discrimination based upon reason and justice can properly exist. The true principle which governs the instant case is correctly stated in Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446. In dealing with the reasonableness of rates and permissible discrimination based upon differences of conditions it is there said: "Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rates with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon a difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been [fol. 191] vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

The Railroad Commission undoubtedly had jurisdiction to make the order under review. Its classification for the purpose of rate-fixing was a legitimate exercise of its power. As a matter of law it cannot be said that it was arbitrary or unreasonable. But, however this may be, its findings and conclusions on questions of "reasonableness and discrimination" are not subject to review by this court.

The order is affirmed.

Seawell, J.

We concur: Lennon, J.; Waste, J.; Wilbur, C. J.; Kerrigan, J.; Lawlor, J.

[fol. 192] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

C

AGREED SUMMARY OF PETITIONERS' PETITION FOR REHEARING

Stipulation

It is hereby stipulated by the respective parties to this case on Writ of Error that the following is an agreed summary of the Petition of the Petitioners for Rehearing and is that to which reference is made in paragraph 9 of the Joint Praecipe and Stipulation filed with the Clerk of the Supreme Court of the State of California with this summary:

Petition of Petitioners for a Rehearing

(Addressed to the Chief Justice and Associate Justices of the Supreme Court of California.)

The petitioners respectfully and most earnestly petition for rehearing in this matter because they believe that, perhaps by reason of a change in the personnel of this Honorable Court since the filing of its former decision referred to in the opinion filed on September 21, 1923, the Court has inadvertently lost sight of the real matter involved.

The Fundamental Issue

The petitioners stand, as they have stood at every stage of the proceedings in this Court and before the Railroad Commission, upon the ground that under Section 10 of Article I of the Constitution of the United States, this state has never had power to pass any law impairing the obligations of the petitioners' pre-existing contracts; that if Section 23 of Article XII of the Constitution of California, or Section 67 of the Public Utilities Act must be construed as apparently they are construed by this Court in its latest decision, both those provisions are void; and, hence, that it is not only within the power [fol. 193] of this Court, in the performance of its obligation to support the Constitution of the United States, but it is its duty to declare such invalidity. Your petitioners do not believe that the only construction to be given Section 67 of the Public Utilities Act and Section 23 of Article XII of the Constitution of California, is one which would render them obnoxious to the Constitution of the United States. They should be so interpreted that they may stand as valid enactments, limited by those provisions of the Constitution of the United States applicable to this case; namely, that no state shall pass any law impairing the obligation of contracts (Const. U. S., Sec. 10, Art. I); that no state shall deprive any person of property without due process of law; and that no state shall deny any

person within its jurisdiction the equal protection of the law. (Const. U. S., Amendmt. XIV, Sec. 1.)

The final conclusion reached in the opinion is as follows:

The Railroad Commission undoubtedly has jurisdiction to make the order under review. Its classification for the purpose of rate-fixing was a legitimate exercise of its power. As a matter of law it cannot be said that it was arbitrary or unreasonable. But, however this may be, its findings and conclusions on questions of "reasonableness and discrimination" are not subject to review by this court.

66 Cal. Dec. 414.

If the prime question of the impairment of the petitioners' contractual rights by an order of the Commission resting upon legislation subsequent in date to the contracts had not been entirely overlooked by the Court, it is impossible to believe that the conclusion quoted would have been reached.

The ultimate conclusion reached in the opinion that whether or not the conclusions of the Railroad Commission were arbitrary or unreasonable, since they were made by the Railroad Commission they are not subject to review by this Court, seems to be rested upon the provisions of Section 67 of the Public Utilities Act quoted in the opinion:

"* * * The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under [fol. 194] review violates any right of the petitioner under the constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. * * *"

and the statement in Section 23 of Article XII of the Constitution of California, also quoted in the opinion, that:

"* * * The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of the Constitution. * * *"

(Live Oak Water Users Association et al. v. Railroad Commission et al., 66 Cal. Dec. 408-411.)

The language quoted in the decision certainly does not mean that the powers of the Railroad Commission of California are above the guarantees of the Constitution of the United States. That this state

cannot either by constitutional amendment or by statute delegate to an administrative body a power which it does not itself possess is so plain that citation of authority upon the subject would be an idle act. When the people of the state granted to the legislature plenary powers notwithstanding any other provision of the Constitution, they meant of the Constitution of California. They could not have meant the Constitution of the United States, and if they did mean any such thing, their intention in that regard can never be fulfilled.

The portion of Section 67 of the Public Utilities Act quoted in the decision expressly reserves power in this Court to review any order of the Commission to determine "whether the order or decision under review violates any right of the petitioner under the Constitution of the United States." Even though this power had not been expressly [fol. 195] reserved in this Court, even though Section 67 of the Public Utilities Act had in terms provided that this Court should not review any decision of the Railroad Commission which it was claimed violated a right of the petitioner under the Constitution of the United States, this Court in the performance of its duty to support the Constitution of the United States (Const. Cal., Art. XX, Sec. 3) unhesitatingly would have examined the question and reached a determination as to whether or not the federal right claimed had been invaded.

The opinion appears to have been written under the impression that the only question involved in this proceeding is that of discrimination. This, perhaps, was because the original decision of this Court was based upon the facts then so clearly pointed out showing the discrimination. (Live Oak Water Users Association, et al. v. Railroad Commission, et al., 65 Cal. Dec. 65.) The discrimination is the result of the attempt to impair the obligations of the petitioners' contracts. The discrimination and the unlawful taking of the petitioners' property are not the primary but the secondary matters involved. The guarantees of the Fourteenth Amendment of the Constitution of the United States are relied upon by the petitioners to protect them from the unequal operation of the law in the matter of discrimination and the taking of their property, by imposing upon it liens to which they never agreed, but the main question to be determined is whether or not the order of the Commission sought to be justified by Section 23 of Article XII of the Constitution and Section 67 of the Public Utilities Act in any way altered the obligations of the petitioners' pre-existing contracts.

It is said in the opinion that

"The Railroad Commission did not attempt to change, limit, modify or abrogate any of the provisions of said contracts." (p. 411.)

It is further said:

"The point we seek to make is that said water contracts are a thing of value and were of sufficient importance to receive the attention and consideration of the Commission in making the classification

[fol. 196] which it did make even though said contracts must yield to the exigencies of great public necessity. * * *" (66 Cal. Dec. 413.)

With every part of the last statement these petitioners are in full accord. It is because their contracts are of value that they invoke the protection of the Constitution of the United States to prevent the change of a single obligation. Because the contracts impliedly provided that in case of public necessity they must yield to the exercise of a sovereign power reserved in the state, the petitioners maintain that the contracts must so yield, and that this sovereign reserved power does not permit the Railroad Commission nor any other agency of the state to change, limit, modify or abrogate any of the provisions of the contracts.

With the utmost respect and deference the petitioners feel assured that on rehearing it will appear that the Commission by its order did change, and limit, and modify the contracts in so many particulars that if the order is permitted to stand the contracts will have been denuded of their value and converted into a menace.

The Obligations of the Contracts Impaired

To determine whether or not the order of the Commission, (as construed by it and apparently confirmed by this Honorable Court upon the sole ground that the Court is without power to review on the ground of discrimination.) impaired any of the obligations of the contracts, a statement of the original obligations, somewhat more extended than the extremely condensed statement contained in the opinion is necessary. The obligations of the contracts were both express and implied. Section 1 of Article XIV of the Constitution of California was adopted before the contracts were entered into, so that in addition to the express terms written in the contracts, the provisions of that section as subsequently interpreted by this Honorable Court, are as fully implied as part of the contracts as though both the section and its interpretation were expressly written in the contracts. In analyzing the contracts it will tend to clear thinking [fol. 197] first to consider:

The Express Conditions

Because of the wealth of authority and the impossibility of any question of the following preliminary statements, no citation is made to support them. The contracts were valid when made. They were obligatory on both parties in accordance with their express terms until the state should exercise its power to fix rates for water service and to make regulations controlling the use of water. The state could not pass any law to impair or in any way change the reciprocal obligations of the parties.

For all the purposes of this proceeding the parties and the Court have rested upon the statement of the express conditions of the contracts contained in an opinion of the Railroad Commission. (Nunn

v. Sutter Butte Canal Company, Dec. 5227, 15 C. R. C. 425-432; Petitioners' Closing Brief herein, pp. 7-12.) From the statement to which reference is made, the following summary of the obligations of the contracts, showing the severability of those relating to service and charges for water from the other obligations, is made.

The contracts, as stated by the Court, in terms were made appurtenant to the land. That is, each defined the total number of acres of land owned by the farmer consumer, and provided that the contract might be transferred only with the land so described. The express obligations of the parties respectively are substantially as follows:

The water company's express obligations:

1. It was to construct and operate its main canal and sundry ditches.

2. It was to deliver water to the land "at the rate of 1 cubic foot per second for each 160 acres for the purpose of irrigation" the land described in the particular contract.

The consumer's express obligations:

1. He was to construct and maintain a ditch extending from the company's ditch to the point of delivery of water to his land.

2. He was to permit the water company at any time to take over [fol. 198] his ditch, to enlarge, and to operate it, provided such use should not interfere with the delivery of water to the lands.

3. He granted to the water company various rights of way, and the right of entry on his lands.

4. He agreed "in consideration of the construction of the main canal, and ditch rights and delivery of water" to pay annually to the company, for ten years at the rate of $1.50 per acre, and thereafter at the rate of $1.00 per acre of all his land.

5. He agreed that upon default of the payment of the annual sums agreed upon they should draw interest at the rate of seven per cent per annum, compounded annually.

6. He agreed that at any time after six months' default in payments and while the default continued, the company by written notice might release itself from further obligations under the contract. The contract was silent as to the rights of way and rights of entry granted by him after such a release.

7. He agreed "that all sums due, or to become due under this contract" should become a lien upon his lands, which "may be foreclosed as any other lien including costs and charges and all necessary and reasonable expenses, and attorney's fees connected therewith."

In the opinion of the Commission from which the foregoing summary is made, it was said that:

"No charge was made from the holders of this type of contract as a condition precedent to the extension of service. The charge of $1.50 per acre per year for the first ten years included the so-called water right charge.

"Other contracts of the same form were issued which provided for a charge of $1.00 per acre per year and a payment of $5.00 or $6.00 per acre for water right or initial payment at the time of the execution of the contract.

"The second principal form of contract is that used by the Sutter-Butte Canal Company. It is essentially the same as that issued by the Butte County Canal Company. The rate was changed to $2.00 per acre per year. A water right or initial charge of $10.00 per acre was generally made from the consumers under this form."

Nunn v. Sutter Butte Canal Co., supra.

There were several forms of contract, but the foregoing is a fair summary. Each contract by its express terms severed the obligations regarding service of water and payment from those relating to maintenance and operation of the ditches and to the rights of way and of entry granted.

[fol. 199] Four things concerning the lien are of vital importance: First, the lien attached upon the signing of the contract and continues during the life of the contract; Second, the lien was limited in amount to sums due or to become due under the contract; Third, the only sums which could become due under the contract were $1.50 per acre each year for ten years, and $1.00 per acre for each year thereafter (or in certain contract $2.00 per year); and, Fourth, this lien definite in amount and limited to money to become due under the contract, might be foreclosed as any other lien, including costs, expenses and attorney's fees, of course, upon any default, however brief and however produced.

In the opinion it is said:

"It is true that any sums which became due for water service became a lien upon the lands and might be foreclosed as such, but this provision was a part of a contract freely entered into." 66 Cal. Dec. 412.

The provision which was a part of the contract was that all sums due or "to become due under the contract" were secured by a lien created at the time the contract was entered into, and the petitioners maintain that there is no power in the state or in any of its agencies to change that obligation of the contract, so that their lands shall be charged with a lien for all sums which may become due for water service under rates fixed by state authority under the law and notwithstanding anything in the contract.

Where in any contract was there any provision expressed, or under what rule of law was there implied in any contract a provision that

"any sums which became due for water service became a lien upon the lands"? The contracts were clear in their statement that "moneys due or to become due under the contract" were secured by a lien. These new rates become due under the law and are collectible as are other public utility rates under the law and not under the contracts.

In consideration of the express obligation of the company to furnish them water at the rate of one cubic foot per second for each [fol. 200] 160 acres owned by them for the price per acre of their holdings agreed to by them, they imposed upon their lands a lien for all time for the agreed price for water service. The lien was for moneys to become due under the contract. The contracts were all in one form as to each group of consumers and the form must have been provided by the water company itself. If there was ambiguity in the form under elementary principles of law the ambiguity would have to be resolved against the company and in favor of the farmer consumer.

The contracts in terms were harsh and apparently one sided. Public necessity demanded that the agricultural resources of California should be developed. To perform this great work of development it was necessary that water should be brought to the lands. It is a matter of state history that farmers from other states were induced to come here and to enter into such contracts upon the assurance that there was plenty of water for the successive colonies opened, and that the water would always be provided at the prices named in the advertisements. It may be claimed that there is no evidence in this case of such advertisements by the Sutter Butte Canal Company or its predecessors in interest, and this may be admitted. It is not desired to depart from the fundamental question of constitutional right involved in this case, but to recall to the minds of the members of this Honorable Court matters of such common knowledge that they must be presumed to rest in the mind of every man at all acquainted with the development of agriculture in California.

Hard as the contracts were, the farmers under the compelling necessity of having water, entered into them in good faith and in good faith fulfilled their obligations. They granted valuable rights of way and rights of entry upon their lands to the water company, they spent vast sums of money in the ditches they were obligated by the contracts to provide, and bound themselves to the covenant that at any time the water company might elect, it might take over from them the very ditches which they had constructed.

Regardless of his desire to have a part in the upbuilding of the agriculture of the state or his own hope of profiting by that develop- [fol. 201] ment, it is inconceivable that any sane man could have been induced to impose for all time a lien upon his land for any amount other than one fixed by, and to become due under the contract. Without doing violence to the law governing the interpretation of contracts, it can not now be determined that when the consumer agreed to a lien for moneys to become due under the contract, and impliedly agreed that notwithstanding the contract and against

its provisions the state might at any time take over the entire matter of regulating the use of water, new and perhaps prohibitive rates for water not desired or used by him should be secured by a lien upon his lands.

Every man is presumeed to know the law. It is a necessary but somewhat humorous fiction because, of course, no man ever did or ever can know all the law. Under this necessary fiction it must be presumed that both the water company and the contracting farmers knew not alone the provisions of Section 1 of Article XIV of the Constitution of California but the interpretation that might be placed upon those provisions by this Honorable Court in cases subsequent in date to the signing of their contracts. When the contracts were entered into the state had done nothing to exercise its sovereign right reserved by that section. It is reasonable to suppose that as a matter of fact both the water company and the farmer consumers were acting in good faith and believed that for all time the water company could be compelled to deliver the water it contracted for all time to deliver, and that the farmer consumer for all time would have his land charged with a lien for the price which he contracted for all time to pay to the water company. In other words, that so long as the water company should continue to deliver to the farmer the amount of water agreed upon between them, the farmer would pay to the water company the price agreed upon and that the price should be secured by a lien upon his lands, all in accordance with and under the contract.

By reason of the necessary fiction that both the farmer and the water company knew of the pre-existing Section 1 of Article XIV of the Constitution and the subsequent interpretation to be placed [fol. 202] thereon by this Court, at the present time and in this case it must be presumed that both the water company in agreeing for all time to deliver a stipulated amount of water under the contract and the farmer agreeing for all time to pay a stipulated sum of money each year under the contract did so upon the covenants implied by that constitutional provision and that interpretation. It becomes necessary, therefore, to determine just what the implied covenants were, and just what power was reserved in the state.

The Implied Conditions.

Apart from those conditions implied in connection with every written contract, it is implied that Section 1 of Article XIV of the Constitution of California became a part of each contract. This implication certainly does not extend beyond the wording of the section of the Constitution in question or the meaning placed on that wording by this Court. So far as it applies to this case, the section is as follows:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law. * * *."

Constitution of Cal., Art. XIV, Sec. 1.

It is beyond question that the water involved here was dedicated to the public use and therefore "subject to the regulation and control of the state" and that the manner of the regulation was "to be prescribed by law." There is no word reserving to the state the power to change a single word, or to add to or detract from a single obligation due from either party under the contract. But for the interpretation placed on the constitutional provision by this Court, if the clause had been written in each contract it would appear that when the water company agreed to deliver water "at the rate of one cubic foot per second for each 160 acres of land" for all time the parties meant until, in the language of the decision in question, "the contract must yield to the exigencies of great public necessity." This statement which appears to be supported by reason and by authority, [fol. 203] is at variance with the following statement also made in the opinion:

"In addition to the advantages here pointed out the contract holder's right to water was appurtenant to and ran with the land and continued as long as the corporate existence of the Canal Company lasted."

66 Cal. Dec. 412.

The reserved power in the state, and the only reserved power was to regulate and control the use of the water dedicated to the public use. The state could not force any consumer to take upon his land more water than he wanted or more water than he had ever contracted to receive, therefore, when the parties contracted that for all time the water company should supply water to the quantity specified in the contract, subject to the state exercising its reserved power of control, in which event the parties understood the contract "must yield to the exigencies of great public necessity," they could have had in mind but one thing, namely that the state might reduce the quantity of water to be supplied, notwithstanding and against the terms of the contract.

The parties must also have had in mind what the result of such action by the state would have been. The water company being thereafter forbidden by superior power to fulfill its contractual obligation to deliver the agreed quantity of water, the contract would have yielded to the exigencies of public necessity, and, since in every contract both parties must be bound or neither, the consumer's contractual obligations for fixed payments secured by lien, would have yielded with the rest of the contract, and a new measure of rates for water service regulated and controlled by the state would have to be established, applicable alike to all consumers. The parties to the contracts could have intended no other thing. If the state shall at any time exercise its single reserved power to reduce the quantity of water any contract holder may have, notwithstanding the contract, the contract must yield to the exigencies of great public necessity, and the contract holder cannot be said to have the right appurtenant to [fol. 204] his land "as long as the corporate existence of the Canal Company lasted." There is nothing in any decision of this Court

contrary to this conclusion, but the principle has frequently been announced, and was clearly defined in a case quoted in the petitioners' closing brief on the first submission of this case.

Leavitt v. Lassen Irrigation Co., 157 Cal. 93.

Long after the contracts involved here were made, in interpreting the language of Section 1 of Article XIV of the Constitution of California, this Court determined that the single reserved power of the state to regulate and control the use of the water carried with it the incidental power to prescribe rates upon which the water should be served.

"The power to prescribe the rates to which water devoted to public use shall be furnished, is, of course, a necessary incident of the power of regulation possessed by the state, for the purpose, among others, of preventing discrimination between persons entitled to the benefit of the use, and insuring to such persons the furnishing of the water to which they may be entitled upon fair and reasonable terms. It is a continuing power that may be exercised, at any time regardless of any attempted contract existing between the public utility and a consumer * * *. Any such contract, although not in violation of any existing law or regulation when made, was necessarily made subject to the continuing power of the state to so effect it, just as much so as if the contract had contained a provision expressly making it so subject."

Limoneira Co. v. R. R. Comm., 174 Cal. 232-238, Jan., 1917.

The single power to regulate and control the use of publicly dedicated water and the purely incidental power of the state to prescribe rates when and only when it exerted its power to control the use, existed before a single contract was made. The power to regulate the use and the incidental power to fix rates, therefore, was a power not in any degree dependent upon the agreement of the parties to these contracts. Moneys collected upon rates fixed pursuant to this incident of the single power of the state to regulate and control the use of waters did not become due under the contract but under and by virtue of the constitutional provision and the [fol. 205] laws passed pursuant to it. If both the constitutional provision, which existed before these contracts were made, and the interpretation placed upon it after these contracts were made, had been written in the contracts, that fact would not have added anything to the power possessed by the state. Either with or without the contractual obligations, express or implied, the money produced by the action of the state becomes due by operation of law, not under, but in opposition to the contracts. To this the parties agreed, and they agreed to nothing else.

It is said in the opinion that "the Railroad Commission did not attempt to change, limit, modify or abrogate any of the provisions of said contracts." This statement may be accepted, if it means what it appears to mean. The intention of the Railroad Commission is not involved here. It is not suggested, on the other hand it

is inconceivable that either the Railroad Commission or this Honorable Court intended or attempted to violate Section 10 of Article I of the Constitution of the United States, by changing, limiting, modifying or invalidating the contracts. The question is not what was intended or attempted, but what the order of the Commission as construed by it effected. Under the contract the landowner created a lien upon all his land fixed in amount in consideration of the low price per acre which he agreed to pay. Impliedly he also contracted that when and if the state should exercise its reserved power to regulate and control the use of water, the state would fix rates which he would pay in the same amount and under the same conditions as all other consumers similarly entitled to service. Conceding the good intentions of the Commission, the effect of its order is to change all this, and to impress on the contract holder's land a lien for water which he does not want and does not use. The petitioners maintain that this is in violation of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligations of their contracts. Many authorities upon this subject are set out in the Petitioners' Authorities on Jurisdiction, filed by leave of the Court upon the oral argument on the first rehearing. It is unnecessary to repeat them here, but the petitioners ask that they be considered herewith.

[fol. 206] Due Process of Law

To the extent of the increased and non-contractual liens upon their lands, their value has been diminished, and under the authorities, this constitutes a taking within the meaning of the Fourteenth Amendment to the Constitution of the United States. The petitioners' authorities on jurisdiction mentioned above are referred to on this phase of the case.

Discrimination

In the petitioners' authorities on jurisdiction, to which reference has been made, authorities are set forth showing that where under the guise of classification, one class is selected to bear unequal and unjust burdens, the provisions of the Fourteenth Amendment to the Constitution of the United — concerning the equal operation of the laws are applicable.

In the statement in the Limoneira case it was said that the incidental power to fix rates was "for the purpose, among others, of preventing discrimination between persons entitled to the benefit of the use, and insuring to such persons the furnishing of the water to which they may be entitled upon fair and reasonable terms." Under the order of the Railroad Commission as construed by it, the exercise of the power resulted in just the opposite of the purpose of the reservation. In the opinion in question here, in referring to the Commission's order of 1918, it is said:

"The contracting parties operated under these contracts without disagreement for several years, during which period the water com-

pany largely extended its irrigation system so as to include among its consumers many persons who were not contract holders, but were merely consumers of water furnished by the water company in its capacity as a public utility * * *. In the year 1917 the Railroad Commission, upon application of the Canal Company, undertook to investigate, establish and fix general water rates for said Canal Company affecting all of the consumers of its water for irrigation, whether contract or non-contract users of said water. All of the parties hereto were parties to that proceeding. The Commission, by its order thereon, made on the 25th day of March, 1918, fixed rates per acre for water affecting all such consumers, and in its decision so doing, provided that the water served thereunder might be charged for at the acreage rate or might be measured by meter and charged for that way * * *. The Commission divided the consumers of the [fol. 207] Canal Company into two classes, those who held contracts and those who did not. The annual rate for contract holders was made somewhat lower than for non-contract holders. The reason for this differentiation was explained by the Commission in its order as being that, since a large portion of the contract holders had paid initial charges in varying amounts per acre, it would seem unfair that new consumers who had not made a similar advance should receive service at a similar cost as those who had made such payment. With respect to the provision in the contracts that the holders thereof should pay water rates according to the acreage of each individual tract, whether the same was irrigated or not, the Commission made no order or ruling which would have had the effect of superseding or abrogating said contracts in that respect. The effect of the order of the Railroad Commission was that the increased rate established by it was to contract holders less per acre than the rate fixed for non-contract customers. The contract holders were required, however, to pay such lower rate upon the basis of the entire acreage of their respective holdings while the non-contract customers were to pay the higher rate on the total acreage designated by the application of the consumer."

66 Cal. Dec. 409-410.

Bearing in mind that the lower rate of the contract consumers was to measure the value of their advance payments, so far as the charge for the annual water service was concerned the acreage rates for both contract and non-contract consumers were on a parity. The non-contract consumer owning 160 acres of land may pay this equalized rate upon 40 acres of land designated by him, while the contract consumer is required by the order of the Commission as construed by it, to pay what was effectually the same rate on his entire 160 acres of land, although he also desired to and actually did irrigate only the 40 acres corresponding to the 40 acres for which his non-contract neighbor applied. Does this show that exercise of the incidental power reserved in the state to fix rates was "preventing discrimination between persons entitled to the benefit of the use"? Were the rates so fixed insuring to the contract holders "the furnishing of the water to which they may be entitled upon fair and reasonable terms"?

It is said in the opinion:

"That there is a logical and natural ground for the classification [fol. 208] made by the Railroad Commission seems convincing. A great many of the contract consumers had, in various ways from the beginning of the utility's existence, aided financially and otherwise in the construction and maintenance of the irrigation system by liberal loans of money, advancements, donations of rights of way and by making initial payments aggregating large amounts for water rights as shown by the record in the instant case."

66 Cal. Dec. 412.

Is the fact that the contract consumers, because of these great benefices passing from them to the water company, a logical reason for making the conditions of water service under the control of the state so much more onerous and more expensive to them than those imposed by the state upon non-contract consumers who have done none of the beneficial things which this Court says the contract consumers have done?

"But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service must have some reasonable relation to the amount of difference and cannot be so great as to produce an unjust discrimination."

Western Union Tele. Co. v. Call Publishing Co., 181 U. S. 92-100, 45 L. Ed. 765-769.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court: Yick Wo v. Hopkins, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'"

Gulf, Colo. & S. Fe Ry. Co. v. Ellis, 165 U. S. 150-159; 41 L. Ed. 666-669.

It is said in the opinion that "the Commission made no order or ruling which would have had the effect of superseding and abrogating said contracts in that respect." The Commission could not have [fol. 209] abrogated the contracts. If its order did not supersede the contracts in regard to the rates, as the exercise of the power incidental to that reserved by which the state might take over the regulation and control of the public use notwithstanding the contracts, what was its effect? As construed by the Commission, did it not change the obligations of the contracts by increasing the liens upon the lands? Where is to be found in Section 1 of Article XIV of the Constitution

of California, power to do this as incidental to the reserved power to regulate and control the public use?

By reason of the change of the obligations of the contracts, as was so clearly pointed out in the original decision in this case, gross discrimination against the contract holders resulted. The contract holder may be charged for exactly the same service under the same physical conditions, two, four, or ten times as much as his non-contract neighbor. In addition to this the land of the contract holder is burdened with a lien far in excess of what, for a consideration which has been taken away by the state, he agreed upon. The lien is subject to foreclosure with attendant costs and attorney's fees, while his next neighbor irrigating exactly the same number of acres of land holds his land free from any such lien, and is not chargeable with costs and attorney's fees for default of bills except after suit and judgment, and then for costs only. Is the statement in the opinion that "the Railroad Commission did not attempt to change, limit, modify or abrogate any of the provisions of said contracts" supportable?

In Conclusion

On the former rehearing reliance was placed and is still placed upon the learned and able decision of this Court in the case of Law v. Railroad Commission, 184 Cal. 737. The opinion now under consideration contains no reference to that case, and the principles announced in it in part at least are those principles of right on which the petitioners in this case have always stood.

[fol. 210] Your petitioners maintain that for all the many reasons shown by this petition, a rehearing should be granted, to the end that their privileges, immunities, and guaranties under the Constitution of the United States as herein set forth may not be violated and that this Honorable Court may correct the manifest errors contained in the opinion.

(Dated October 10, 1923. Signed by attorneys for petitioners.)

The foregoing summary is in accordance with the stipulation concerning the same under paragraph 9, of the Joint Præcipe and Stipulation in this case and for all purposes of the Writ of Error in the Supreme Court of the United States in this case said summary is full, true and correct.

Dated this 5th day of May, 1924.

T. S. Brittain, Attorney and Solicitor for Petitioners in Error. Hugh Gordon, Carl I. Wheat, Attorneys and Solicitors for Defendant in Error Railroad Commission of California. Devlin & Brookman, Isaac Frohman, Attorneys and Solicitors for Defendant in Error Sutter-Butte Canal Company (a Corporation).

[fol. 211] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER DENYING REHEARING—Filed October 19, 1924.

By the COURT:

Rehearing denied October 18, 1923 (all concur).

Wilbur, C. J.

[File endorsement omitted.]

[fol. 212] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

JUDGMENT

The above entitled matter having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged and decreed by the Court that the order of the Railroad Commission of the State of California in the above entitled cause be and the same is hereby affirmed.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 21st day of September, 1923, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 23d day of October, A. D. 1923.

B. Grant Taylor, Clerk, by I. M. Johnson, Deputy. (Seal.)

[fol. 213] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed November 16, 1923

To the Honorable Curtis D. Wilbur, Chief Justice of the Supreme Court of California:

Now comes the above named C. W. Thresher, one of the plaintiffs in error, and joined with him W. G. Coppernoll, and Live Oak Water Users' Association, Butte County Farm Bureau, Sutter County Farm Bureau, and California Farm Bureau Federation, each being one of the plaintiffs in error in the above cause, and each of them respectfully shows that:—

Said W. G. Coppernoll is in all respects situated similarly to said C. W. Thresher in regard to the matters and things hereinafter set forth; and the said Live Oak Water Users' Association, Butte County Farm Bureau, Sutter County Farm Bureau and California Farm Bureau Federation is each an unincorporated association of many persons, who are situated similarly to said C. W. Thresher in regard to said matters and things, and who are, and at all times during the course of the proceedings herein have been represented herein respectively by said associations.

On the 21st day of September, 1923, in the above entitled cause, the Supreme Court of California, it being the highest court of said state in which a decision in said cause could be had, rendered a certain judgment against the plaintiffs in error and in favor of the defendants in error, and said judgment became operative and final on [fol. 214] the 21st day of October, 1923. In the record and proceedings, and rendition of said judgment, and in permitting the same to become conclusive, manifest error has occurred greatly to the injury and damage of the said C. W. Thresher, and of said W. G. Coppernoll, and of each of said other persons similarly situated, and the said C. W. Thresher, and said W. G. Coppernoll, and each of the other plaintiffs in error feels aggrieved.

In the record and proceedings it will appear that there was drawn in question the construction of and an authority exercised by the Railroad Commission of the State of California, under Sections 22 and 23 of Article XII of the Constitution of the State of California, and under that certain Act of the Legislature of the State of California, known and designated as the "Public Utilities Act," adopted in 1915, as amended in 1917 and 1919, (Statutes of California, 1915, Chapter 91; Statutes of California, 1917, Chapters 120, 137, 176, 209 and 707; and Statutes of California, 1919, Chapter 303), on the ground of repugnancy to the Constitution of the United States, and the decision was in favor of the exercise of authority under said provisions of the laws of said state; and, there was drawn in question the construction and application of three several clauses of the Constitution of the United States, that is to say, the clause of Section 10 of Article I of the Constitution of the United States by which the State of California is prohibited from passing any law impairing the obligation of pre-existing contracts; the clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States by which the State of California is prohibited from taking private property without due process of law; and, the clause of said Section 1 of the said Fourteenth Amendment by which the State of California is prohibited from denying any person within its jurisdiction the equal protection of the laws, and the decision was against the rights, titles, privileges and exemptions specially set up and claimed under each of said three clauses of the Constitution of the United States.

Four federal questions are and were presented in this proceeding:

First, whether or not the Railroad Commission of the State of Cali- [fol. 215] fornia, deriving its powers from and in reliance upon the provisions of said Sections 22 and 23 of Article XII of the Constitution of California, and the provisions of said Public Utilities Act of

California, (Statutes of California, 1915, Chapter 91, as amended, Statutes of California, 1917, Chapters 120, 137, 176, 209 and 707, and Statutes of California 1919, Chapter 303) and particularly Sections 17, 19 and 67 of said Public Utilities Act, all of which were adopted subsequent to the 1st day of October, 1911, has or had power to change the terms of a certain contract for water service between said C. W. Thresher and the predecessor in interest of the Sutter-Butte Canal Company, and of a similar contract between said W. G. Coppernoll and the predecessor in interest of said Sutter-Butte Canal Company, and of each of many similar contracts held by said other persons represented herein by said other plaintiffs in error, each of which said contracts was made long prior to said 1st day of October, 1911, and all of said contracts being in full force and effect at the time of the exercise of the claimed authority of said Railroad Commission to change their terms and to impair their obligations, against the will of the said C. W. Thresher, and of each of said other persons, in contravention of the clause of Section 10 of Article I of the Constitution of the United States by which the State of California is prohibited from passing any law impairing the obligation of contracts;

Second, whether or not the State of California, acting by and through the agency of the Railroad Commission of California, in the exercise of its admitted power to fix rates for public utility water service had or has power to require certain consumers, and particularly said C. W. Thresher, and said W. G. Coppernoll and said other persons similarly situated to pay for water service for irrigation, rates fixed by said Railroad Commission largely in excess of rates fixed by [fol. 216] said pre-existing contracts, at a price per acre of all the land owned by said C. W. Thresher, and by said other persons respectively, and to secure the payment of said rates by a continuing lien upon all the land of each such consumer, and particularly of said C. W. Thresher, regardless of whether all, or only a part, or none of said land is irrigated, or susceptible of irrigation or desired in any year to be irrigated or not, without the consent of said consumers, in the absence of any provision of law for the imposing of such liens and in contravention of that clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting the State of California from depriving any person of property without due process of law;

Third, whether or not the State of California, acting by and through the agency of the Railroad Commission of California, in the exercise of its admitted power to fix rates for public utility water service, and to classify consumers of such service upon differences, if any exist, of service conditions, has power to classify consumers of the Sutter-Butte Canal Company into two classes, designated respectively as "contract consumers" and "non-contract consumers," where the conditions of service are the same, and, upon such classification to permit so-called "non-contract consumers" annually to designate the whole, or any part, or none of their respective land holdings for irrigation for the current year, and to pay acreage rates, unsecured by any lien, applied only to the acreage so designated, and to deny to

so-called "contract consumers" the privilege and right to make similar annual designation of the acreage desired by them to be irrigated in the current year, and to require such "contract consumers" to pay substantially the same acreage rates applied to all the land in their respective ownership whether susceptible of irrigation, or desired [fol. 217] to be irrigated, or irrigated or not, and to impose a lien upon the whole of the lands of such "contract consumers" to secure the payment of the water rates so fixed, in contravention of that clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting the State of California from denying to any person within its jurisdiction the equal protection of the law.

Fourth, whether or not the Supreme Court of the State of California has power, or has been, or can be denuded of power, under the Public Utilities Act of said state, to review an order of the Railroad Commission of California, in a case where parties regularly before the Supreme Court of California in good faith maintain that by such order of the Railroad Commission of California they have been denied the equal protection of the laws by being included in one of two classes of consumers under a classification based on no difference in regard to service of a public utility, and claiming further, that as members of such class that they are burdened far in excess of other consumers in the other of said two classes; and, where in good faith they further claim that by the increase and imposition of a lien upon their lands to which they never consented, and for which there is no provision of law, their property has been taken without due process of law; and, where in good faith they further claim that the obligations of their contracts have been impaired by such order in the exercise of an authority claimed by said Railroad Commission by virtue of laws of the State of California adopted after the making of such contracts.

Each of said four federal questions is real and not fictitious; the claim of said C. W. Thresher, and of said W. G. Coppernoll, and said other plaintiffs in error are made in good faith; the decision of said [fol. 218] questions and of each of them is necessary to the determination of this cause, and the said questions arose and were presented in the manner following:

The Sutter-Butte Canal Company is a corporation organized and existing under the laws of the State of California, and is and for many years has been exercising the functions of a public utility in the service of water for the purpose of irrigation to large numbers of landowners engaged in agricultural pursuits in the Counties of Sutter and Butte in said State. It is the successor in interest of certain other persons and corporations, who between 1900 and 1911 entered into contracts for water service with said C. W. Thresher, said W. G. Coppernoll, and many other persons in the vicinity.

Said contracts were originally made in connection with the sale of lands by the predecessors of the Sutter-Butte Canal Company, and in each contract all the land to which the particular contract applied was described in it.

The contract of C. W. Thresher was dated on the 24th day of June, 1904, and applied to 625 acres of land owned by him. In regard to the price to be paid for water service it provided that for a period of eleven years from its date he should pay annually at the rate of $1.50 an acre for each of the 625 acres, and after the expiration of said period he should pay annually at the rate of $1.00 an acre for each of the 625 acres.

The contracts, except as to minor differences not involved in the federal questions presented, were all in substantially the same form. Each in terms provided that the water "covered by the contract" should be appurtenant to the land described in the contract. The Canal Company agreed to furnish water at the rate of one cubic foot per second for each 160 acres of land, and the consumer agreed to pay the aggregate annual charge on the 1st day of September of each year. In the event of default of payment the Canal Company reserved the right, upon notice, to relieve itself of further obligations. Each contract further provided that "all sums due or to become due under this contract" to the Canal Company, should "be and become a lien upon the lands" described, and that such lien might be foreclosed as any other lien, including costs and charges [fol. 219] and all necessary and reasonable expenses, and attorney's fees connected therewith.

Eact of said contracts was made in view of and was subject to a continuing power, reserved in the State of California by the provisions of Section 1 of Article XIV of the Constitution of California, which said provision in so far as it applies to this cause, is as follows:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law * * *."

The Honorable Supreme Court of California has heretofore determined that the power to fix rates for such water is a necessary incident of the reserved power to regulate and control the use.

On the 10th day of October, 1911, the State of California, by an amendment to the Constitution of said state, known as Section 22 of Article XII thereof, created the present defendant in error, the Railroad Commission of the State of California.

On the 3rd day of November, 1914, the State of California, by another amendment to said Constitution, known as Section 23 of Article XII thereof, extended the powers of said Railroad Commission to regulate and control all public utilities, and in and by said amendment purported to vest in the Legislature of California plenary powers, unlimited by any other provision of said Constitution, to confer other and additional powers on said Railroad Commission.

In the year 1915, the Legislature of California adopted an Act, known and designated as the "Public Utilities Act," and designated as Chapter 91, of the Statutes of California, of 1915. Said Act was subsequently amended by said Legislature in 1917, in Chapters 120, 137, 176, 209 and 707, of the Statutes of California, of 1917;

and by said Legislature in 1919, in Chapter 303 of the Statutes of California, of 1919.

In reliance upon the powers vested in it by said provisions of the Constitution of California and of Said Public Utilities Act, after hearings and the reception and consideration of evidence, in a proceeding duly instituted by the said Sutter-Butte Canal Company, [fol. 220] the said Railroad Commission of California, on the 25th day of March, 1918, rendered a certain decision, designated in the records of said Commission as Decision No. 5227, in terms establishing rates for water service by said Sutter-Butte Canal Company, and directing said Canal Company to file and put into effect within twenty days thereafter its revised rules, regulations and contracts.

Said Sutter-Butte Canal Company filed revised rules, and thereafter in reliance upon said Decision No. 5227 it claimed the right to collect from each of said consumers who had entered into said contracts hereinbefore described, the rates per acre fixed by said Decision No. 5227, applied to the entire acreage described in said contracts respectively, while permitting other consumers who had not entered into such contracts and who received the same character of water service, annually to designate the number of acres of their respective land holdings desired by them to be irrigated, and to pay the acreage rates fixed by said Decision No. 5227, upon such acreage as they might so designate. Portions of the land owned by the holders of said old contracts were not susceptible of irrigation, and diversity of crops rendered it undesirable for all said land owners each year to irrigate the entire acreage of their respective holdings.

The said consumers who had entered into said original contracts maintained that said Decision No. 5227 of the said Railroad Commission should not be interpreted as claimed by said Sutter-Butte Canal Company, and while the matter was still in dispute, the said Sutter-Butte Canal Company, on the 5th day of November, 1921, filed its application with said Railroad Commission for an increase of water rates.

Regularly pursuing its authority said Railroad Commission made its order for public hearings upon said application, and in the manner and form in accordance with the practice of said Commission, each of the plaintiffs in error herein, was given permission by said Commission to enter his or its appearance by counsel in said matter, by an oral statement of the fact of such appearance, noted by the official shorthand reporter of said Commission in attendance upon said hearing.

Under the practice recognized and established by the said Rail- [fol. 221] road Commission it is not customary nor considered necessary for protestants against such applications to file written pleadings, their objections and claims being made orally and noted by said official reporter, and the same being considered and determined by said Railroad Commission in its final determination, and said practice was adopted without objection in the said proceeding.

During the course of said hearings it was stipulated that the record in said proceeding culminating in said Decision No. 5227, should be considered in evidence.

During the course of said hearings the plaintiffs in error, by their counsel, made the specific claims that the State of California was without power to change the terms of the said contracts by virtue of laws adopted subsequent to the making of said contracts and that it was without power to burden the lands of the contract consumers with a lien for water rates in excess of those fixed by said contracts, or to require them to pay the acreage rates fixed by the state acting through the Railroad Commission, for acreage not desired by them to be irrigated and not in fact irrigated, and said plaintiffs in error, by counsel, formally moved said Commission to interpret its former Decision No. 5227, in the light of the showing then made. The matter was argued at length and taken under advisement by said Commission, and no ruling was made thereupon until its decision of the entire proceeding before it, when on the 26th day of April, 1922, said Railroad Commission rendered its Decision No. 10,372, in said matter, changing and increasing the prior acreage rates for water service, and, upon the subject of said former contracts, in said Decision said Railroad Commission made the ruling that such contracts are subject to revision, and that "to the extent that rates for water are changed by the orders of the Railroad Commission, these contracts are modified or reformed but are not wholly superseded or abrogated."

Thereafter and within the time allowed therefor the plaintiffs in error, in the manner and form prescribed by said Public Utilities Act, filed their petition for rehearing with said Railroad Commission, specifying among other things, that the finding of the said [fol. 222] Commission that said consumers must pay for the entire acreage of land owned by them irrespective of use of water is unlawful and beyond the jurisdiction of the Commission, and, that

"The finding that the Commission intended to treat these contract holders as a separate class, and as to them, the increase in rates applied to the entire acreage under contract is unlawful and beyond the jurisdiction of the Commission, in that it is an attempt on the part of the Commission to make a new contract for the parties."

Thereafter on the 22nd day of May, 1922, the said Commission made its order reciting that the matters referred had been fully presented and considered in said proceedings, and denying said petition for rehearing.

Thereafter and within the time allowed and in the manner and form prescribed by law therefor, the plaintiffs in error, on the 21st day of June, 1922, commenced the above entitled cause by filing in the Supreme Court of the State of California their petition for a writ of review, in substance setting forth the various matters and things herein stated, and in terms denied that the Railroad Commission has power to make new contracts for the petitioners therein, in regard to water not served by the company, and further denied that said Commission had power to permit the utility corporation to charge, demand or compel payment of any sum of money of its

consumers for water not served or at any rate based upon the acreage of land to which no water is delivered. In said petition it was further alleged that when the State of California undertook to fix rates for water service each of said contracts was as to further dealings between the parties superseded by the rates established by the said Commission for water service.

Upon consideration of said petition, the Supreme Court of the State of California caused to be issued and served its Writ of Review thereon, to the Railroad Commission and to the Sutter-Butte Canal Company, the defendants in error.

Thereafter and in response to said Writ of Review, return was duly made and the records of said Railroad Commission culminating in, and including its said two decisions Nos. 5227 and 10372, were certified by it and delivered to said Supreme Court of California.

[fol. 223] Thereafter, the respective parties filed printed briefs in which said federal questions were argued at length, and, on consideration of the case, on the 8th day of January, 1923, the Supreme Court of California rendered a judgment annulling said order of the Railroad Commission of California made on the 26th day of April, 1922, and designated as Decision No. 10372, upon the ground that the said Commission exceeded its powers in making said classification and in fixing said rates which the Court determined were discriminatory and contrary to law as applied against the plaintiffs in error.

Thereafter, petitions for rehearing were filed in said Supreme Court of California by the defendants in error, and in said petitions it was claimed among other things that the Supreme Court of the State of California, under Section 67 of said Public Utilities Act, is without power to review an order of said Railroad Commission, involving the questions of reasonableness and discrimination, and said Supreme Court granted said petitions.

Thereafter, and after further briefing and argument thereupon, the Supreme Court of the State of California, on the 21st day of September, 1923, rendered its judgment, which became operative on the 21st day of October, 1923, affirming said order, Decision No. 10372, made by the Railroad Commission of California on the 22nd day of April, 1922, and holding that the Railroad Commission did not attempt to change, limit, modify or abrogate any of the provisions of said contracts; that there is no claim made that the rates established by the Railroad Commission were confiscatory or oppressive; that the Railroad Commission had jurisdiction to make the order under review; that its classification for the purpose of rate-fixing was a legitimate exercise of its power; that as a matter of law it cannot be said that such classification was arbitrary or unreasonable; that the findings and conclusions of the Railroad Commission on questions of reasonableness and discrimination are not subject to review by the Supreme Court of California.

Thereafter, and within the time allowed by law therefor, the plaintiffs in error filed in said Supreme Court of California, before [fol. 224] said judgment became operative by the remittitur thereof

on the 21st day of October, 1923, their petition for rehearing, expressly and in terms asserting and claiming that said Supreme Court had power to review said order of the said Railroad Commission, and that said order violated the provisions of the Constitution of the United States in the particulars set forth in the first, second and third of the federal questions hereinbefore set forth.

All said matters and things are apparent in the record and proceedings of the case, and specifically set forth in the assignment of errors filed herewith.

Said final judgment of the Supreme Court of California, and the operation of the said order of the Railroad Commission of said state affirmed thereby injure the plaintiff in error, C. W. Thresher, and also injure the plaintiff in error, W. G. Coppernoll, and each of said other persons similarly situated and represented herein by the other plaintiffs in error, by impairing the obligations of their respective contracts for water service, and thereby imposing on their respective lands continuing liens for large sums of money, and by denying them of water for the irrigation of such portions of their respective lands as are susceptible of irrigation, or desired by them in any year to be irrigated, except upon the condition that they respectively pay also acreage rates for the entire acreage of lands owned by them whether irrigated or not, while their neighbors in receipt of exactly similar water service are required to pay such acreage rates applied only to so much of their lands as respectively they may designate annually.

Wherefore, said C. W. Thresher and W. G. Coppernoll, each for himself, and each of the other plaintiffs in error pray that a Writ of Error returnable to the Supreme Court of the United States be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C., under the rules of said Court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

F. S. Brittain, Attorney and Solicitor for Petitioners and Plaintiffs in Error.

[fol. 225] [File endorsement omitted.]

[fol. 226] In Supreme Court of California

[Title omitted]

Assignment of Errors—Filed November 16, 1923

Now comes the above named C. W. Thresher, one of the Plaintiffs in error, and joined with him W. G. Coppernoll, and Live Oak Water Users' Association, Butte County Farm Bureau, Sutter County Farm Bureau and California Farm Bureau Federation, each being one

of the plaintiffs in error in the above numbered and entitled cause, and files with the Petition for a Writ of Error in this cause this Assignment of Errors; and each and every — of the plaintiffs in error assigns the following errors and each thereof, which each of said plaintiffs in error avers occurred in the progress and determination of said cause, and upon each of which each of said plaintiffs in error relies to reverse the judgment herein as appears of record:

I

The Supreme Court of the State of California erred in holding that "the Railroad Commission did not attempt to change, limit, modify, or abrogate any of the provisions of said contracts." (meaning thereby the contracts for water service involved in this cause), because the uncontradicted evidence, and the only evidence upon the subject was the finding and determination of the said Railroad Commission, in its Decision No. 10372, being a part of the order under review, in referring to said contracts and to the present plain-[fol. 227] tiffs in error, the said Railroad Commission concluded that:

"Another group of consumers holding contracts similar to those just referred to take a totally different position and urge that as to them, applicant is a public utility and the former action of the Commission, fixing rates different from those specified in their contracts, has resulted in the complete abrogation of these contracts in all particulars. We think this contention is also unsound. It is well settled in this state that contracts of this sort are subject to revision. To the extent that the rates for water are changed by the orders of the Railroad Commission these contracts are modified or reformed but not wholly superseded or abrogated. Other provisions of such contracts may remain in full force and effect."

II

The Supreme Court of the State of California erred in failing and refusing to pass upon the first federal question presented by the pleadings and apparent upon the face of the record of whether or not the Railroad Commission of the State of California, deriving its powers from and in reliance upon the provisions of said Sections 22 and 23 of Article XII of the Constitution of California, and the provisions of the Public Utilities Act of California. (Statutes of California, 1915, Chapter 91, as amended, Statutes of California, 1917, Chapters 120, 137, 176, 209 and 707, and Statutes of California, 1919, Chapter 303) and particularly Sections 17, 19, and 67 of said Public Utilities Act, all of which were adopted subsequent to the 1st day of October, 1911, has or had power to change the terms of a certain contract for water service between said C. W. Thresher and the predecessor in interest of the Sutter-Butte Canal Company, and of a similar contract between said W. G. Coppernoll and the predecessor in interest of said Sutter-Butte Canal Company, and of each of many

similar contracts held by said other persons represented herein by said other plaintiffs in error, each of which said contracts was made long prior to said 1st day of October, 1911, and all of said contracts being in full force and effect at the time of the exercise of the claimed authority of said Railroad Commission to change their terms and to impair their obligations, against the will of the said C. W. Thresher, and of each of said other persons, and by virtue of said laws of the State of California, in contravention of the clause of Section 10 of [fol. 228] Article I of the Constitution of the United States by which the State of California is prohibited from passing any law impairing the obligation of contracts.

III

The Supreme Court of the State of California erred in holding that "the plaintiffs in error introduced no evidence before the Commission," because the records show that it was stipulated in the hearing before the Railroad Commission that the entire record in a preceding hearing should be considered in evidence and said record was certified and was before the Supreme Court of the State of California at the time of its rendition of the judgment of which complaint is made and the plaintiffs in error rely upon said record in this cause.

IV

The Supreme Court of the State of California erred in holding that "it is true that any sums which became due for water service became a lien upon the lands and might be foreclosed as such, but this provision was a part of a contract freely entered into," because the uncontradicted evidence shows that the only provision in any of the contracts in controversy in this cause relating to liens was as follows:

"It is further understood and agreed, that all sums due or to become due under this contract in favor of the party of the first part shall be and become a lien upon the lands herein described, and may be foreclosed as any other lien including costs and charges and all necessary and reasonable expenses, and attorney's fees connected therewith."

and in the exercise of the admitted powers of the Railroad Commission of the State of California to fix rates for public utility water service, the rates so fixed are fixed by operation of law and the sums coming due thereunder are not sums due or to become due under any of said contracts.

[fol. 229]

V

The Supreme Court of the State of California erred in holding that "there is no claim made that the rates established by the Railroad Commission were confiscatory or oppressive," because it is apparent from the face of the record and the uncontradicted evidence, that the

plaintiffs in error in hearings before the Railroad Commission of the State of California in the proceeding on the application of the Sutter-Butte Canal Company for increased rates and culminating in the order of which complaint was made in this cause to the Supreme Court of California, in their Petition for Rehearing addressed to said Railroad Commission after said order was made, in their Petition for a Writ of Review by which this cause was commenced in said Supreme Court, and in their briefs and arguments therein after said Writ of Review was granted by said Supreme Court, constantly urged, and they now maintain that the said Railroad Commission had and has no power to change, or modify, or reform their respective contracts by changing and increasing the acreage rates for water service fixed by said contracts, and that such contracts as so changed would and did subject the lands of the respective holders of such contracts to the burden of liens for which they had never contracted, and for the imposition of which liens there is no warrant of law, and further, that said order by reason of such change in said contracts required the holders thereof to pay for water service not desired by, or furnished to them, and said rates as so established by said Railroad Commission are confiscatory and oppressive in each of said particulars as to the plaintiff in error, C. W. Thresher, and as to the palintiff in error, W. G. Coppernoll, and as to each of the other persons similarly situated and represented herein by the other plaintiffs in error.

VI

The Supreme Court of the State of California erred in failing and refusing to pass upon the second federal question presented by the pleadings and apparent upon the face of the record of whether or not the State of California, acting by and through the agency of the Railroad Commission of California, in the exercise of its admitted [fol. 230] power to fix rates for public utility water service had or has power to require certain consumers, and particularly said C. W. Thresher, and said W. G. Coppernoll and said other persons similarly situated to pay for water service for irrigation, rates fixed by said Railroad Commission largely in excess of rates fixed by pre-existing contracts, at a price per acre of all the land owned by said C. W. Thresher, and by said other persons respectively, and to secure the payment of said rates by a continuing lien upon all the land of each such consumer, and particularly upon the land of said C. W. Thresher, and of said W. G. Coppernoll, and of each of many other persons similarly situated and represented herein by said other plaintiffs in error, and regardless of whether all, or only a part, or none of said land is irrigated, or susceptible of irrigation, or desired in any year to be irrigated, or not, without the consent of said consumers, in the absence of any provision of law for the imposing of such liens, and in contravention of that clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting the State of California from depriving any person of property without due process of law.

VII

The Supreme Court of the State of California erred in holding that the classification by the Railroad Commission of the State of California of the consumers of water for irrigation supplied by the Sutter-Butte Canal Company, as a public utility corporation, into two classes, designated as "non-contract consumers" and "contract consumers" for the purpose of rate fixing, was a legitimate exercise of the power of said Railroad Commission, because it appears without contradiction from the record that there was no evidence introduced before the Railroad Commission to show that there is, and in fact there is not, any difference in service of such water to or between said so-called "non-contract consumers" and said "contract consumers," and by said classification and the said order of the said Railroad Commission made in pursuance of such classification, the rates and conditions of and for such water service are discriminatory against the said so-[fol. 231] called "contract consumers" and in favor of said "non-contract consumers," because the uncontradicted evidence was that by said order and classification the so-called "non-contract consumers" are permitted to designate each year the entire acreage of lands owned by them respectively, or any part of such acreage or none of such acreage for irrigation, and to have water service for the acreage so designated, paying therefor acreage rates, applied only to the acreage of the respective land holdings of such "non-contract consumers" so designated, said rates not being secured by any lien or charge upon any part of the respective lands of said "non-contract consumers," and by said order the "contract consumers" are denied the right and privilege of making such designation of lands desired by them to be irrigated, and whether only a part or none of their respective lands or all of the same are irrigated, such "contract consumers" are by said order required to pay substantially the same acreage rate, similarly fixed by said Railroad Commission, applied to the entire acreage of their respective land holdings, and, further by said order the aggregate amount to become due under said order from said "contract consumers" is imposed as a lien on the entire respective land holdings of said "contract consumers," which said liens, under said order, may be foreclosed as any other lien, including costs and charges and all necessary and reasonable expenses and attorney's fees connected therewith.

VIII

The Supreme Court of the State of California erred in holding that as a matter of law it cannot be said that the classification made by the Railroad Commission of the State of California of consumers of water served for irrigation by the Sutter-Butte Canal Company as a public utility, into two classes designated as "non-contract consumers" and "contract consumers" was arbitrary or unreasonable, because it appears without contradiction from the record that there was no evidence to show that there is, and in fact there is not, any difference in the service of such water to or between the so-called "non-contract

consumers" and "contract consumers" and by said classification and [fol. 232] said order of said Railroad Commission the so-called "contract consumers" are arbitrarily selected and subjected to more onerous charges and burdens than are the so-called "non-contract consumers" for exactly the same service.

IX

The Supreme Court of the State of California erred in failing and refusing to pass upon the third federal question presented by the pleadings and apparent upon the face of the record of whether or not the State of California, acting by and through the agency of the Railroad Commission of California, in the exercise of its admitted power to fix rates for public utility water service, and to classify consumers of such service upon differences, if any exist, of service conditions, had or has power to classify consumers of the Sutter-Butte Canal Company into two classes, designated respectively as "contract consumers" and "non-contract consumers," where the conditions of service are the same, and upon such classification to permit so-called "non-contract consumers" annually to designate the whole, or any part, or none of their respective land holdings for irrigation for the current year, and to pay acreage rates, unsecured by any lien, applied only to the acreage so designated, and to deny to so-called "contract consumers" the privilege and right to make similar annual designation of the acreage desired by them to be irrigated in the current year, and to require such "contract consumers" to pay substantially the same acreage rates applied to all the land in their respective ownership, whether susceptible of irrigation, or desired to be irrigated, or irrigated, or not, and to impose a lien upon the whole of the lands of such "contract consumers" to secure the payment of the water rates so fixed, in contravention of that clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States prohibiting the State of California from denying to any person within its jurisdiction the equal protection of the law.

X

The Supreme Court of the State of California erred in holding that [fol. 233] the findings and conclusions of the Railroad Commission of the State of California, in a proceeding before said Commission to fix rates for water service as a public utility, are not subject to review by said Supreme Court in this case prosecuted under a Writ of Review granted by said Supreme Court to petitioners aggrieved by the order of said Railroad Commission under review, in which case in good faith such petitioners claimed they had been injured by said order of said Railroad Commission in that by it they were denied the equal protection of the laws guaranteed them by Section 1 of the Fourteenth Amendment of the Constitution of the United States, by an unreasonable and as to them discriminatory classification of consumers of such public utility water service, based upon no difference of service; and, further claimed that by said order they were respectively deprived

of their property without due process of law contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States by the imposition of a lien upon their respective lands against their consent and without warrant of law; and, further claimed that said Railroad Commission deriving its powers under Sections 22 and 23 of Article XII of the Constitution of California and the Public Utilities Act of said State of California, by virtue of said laws as construed and applied by said Railroad Commission in making said order, had changed and modified the respective contracts for water service by said Sutter-Butte Canal Company, with the plaintiff in error C. W. Thresher, and plaintiff in error, W. G. Coppernoll, and many other persons represented by the other plaintiffs in error, each of which said contracts antedated the adoption of said Sections 22 and 23 of Article XII of the Constitution of California and the adoption of said Public Utilities Act, and each of which said laws of the State of California as so construed and applied by said Railroad Commission of California, and by the Supreme Court of the State of California, impairs the obligations of each of said contracts in contravention of the provisions of Section 10 of Article I of the Constitution of the United States.

XI

The Supreme Court of the State of California erred in failing and [fol. 234] refusing to pass upon the fourth federal question presented by the pleadings and apparent upon the face of the record of whether or not the Supreme Court of the State of California has power, or has been, or can be denuded of power, under the Public Utilities Act of said state, to review an order of the Railroad Commission of California, in a case where parties regularly before the Supreme Court of the State of California in good faith claim that by such order of the Railroad Commission of California they have been denied the equal protection of the laws by being included in one of two classes of consumers under a classification based on no difference in regard to service of a public utility, and that as members of such class they are discriminated against and burdened far in excess of other consumers in the other of said two classes; and, where in good faith they further claim that by the increase and imposition of a lien upon their lands to which they never consented, and for which there is no provision of law, their property has been taken without due process of law; and, where in good faith they further claim that the obligations of their respective contracts for water service have been impaired by such order in the exercise of an authority claimed by said Railroad Commission by virtue of laws of the State of California adopted after the making of such contracts.

XII

The Supreme Court of the State of California erred in holding that the Railroad Commission had jurisdiction to make the order under review in this cause, because said order was made under an interpretation of the Public Utilities Act of the State of California

and of Sections 22 and 23 of Article XII of the Constitution of California and by authority of said act and said sections of said Article XII of the Constitution of California as so interpreted, and it did in terms change the contracts for water service involved herein, and did thereby impair the obligations of each of the contracts involved in this cause, and each of said contracts was made before the adoption of said Public Utilities Act and before the adoption of [fol. 235] either Section 22 or Section 23 of Article XII of the Constitution of California; and, because said order deprived the plaintiff in error, C. W. Thresher, and the plaintiff in error W. G. Coppernoll, and each of the other persons represented herein by the other plaintiffs in error of their property, without due process of law, by imposing a lien upon the respective property of each of said persons, to which none of said persons ever consented, and for which there is no warrant at law; and, because said order classified the consumers of the public utility water service of the Sutter-Butte Canal Company into so-called "contract consumers" and so-called "non-contract consumers" and fixed rates and conditions for exactly the same water service which said rates and conditions were more onerous upon said "contract consumers" than upon said "non-contract consumers" and thereby said "contract consumers" were denied the equal protection of the laws.

XIII

The Supreme Court of the State of California erred in rendering its judgment affirming the order of the Railroad Commission of California under review, because said order was beyond the jurisdiction of the said Railroad Commission, and it violates the rights of the plaintiff in error C. W. Thresher, and of the plaintiff in error W. G. Coppernoll, and of each of the other persons represented herein by the other plaintiffs in error, under the Constitution of the United States in each of the following particulars:

1. Upon an interpretation and application of Sections 22 and 23 of Article XII of the Constitution of California and the Public Utilities Act of said state, and under the authority thereof as so interpreted and applied, said Public Utilities Act of the State of California is violative of that clause of Section 10 of Article I of the Constitution of the United States by which the State of California was and is prohibited from passing any law impairing the obligations of contracts and said Public Utilities Act was passed and adopted subsequent to the making of the contracts involved in this clause, [fol. 236] and said order of said Railroad Commission made under the authority of said Public Utilities Act as so interpreted by the Supreme Court of California changes the terms of each of said contracts and thereby impairs their respective obligations.

2. Said order of said Railroad Commission is violative of the clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States by which the State of California is

prohibited from depriving any person of property without due process of law in this that said order imposes a lien upon and thereby diminishes the sale value and impedes the power of dispossession of the lands respectively owned by the plaintiff in error C. W. Thresher, and the plaintiff in error W. G. Coppernoll, and each of the other persons represented herein by the other plaintiffs in error, none of them having ever consented to the imposition of a lien for water rates fixed by, or for sums becoming due under the orders of the Railroad Commission of California or any other agency of said state, and there being no warrant of law for the imposition of such liens.

3. Said order of said Railroad Commission under review is violative of that provision of Section 1 of the Fourteenth Amendment of the Constitution of the United States by which the State of California is prohibited from denying to any person within its jurisdiction the equal protection of the laws in this that by said order the said Railroad Commission undertook to classify the consumers of water service furnished by the Sutter-Butte Canal Company as a public utility into two classes designated as "non-contract consumers" and "contract consumers" and the record shows without contradiction that there was no evidence of the existence of any difference of service between said two classes of consumers, and in fact there was no difference of service, and said order and the rates fixed thereby [fol. 237] were discriminatory against said "contract consumers" in that the said "non-contract consumers" by said order are permitted annually to designate the whole or any part or none of their respective land holdings for irrigation for the current year, and to pay acreage rates, unsecured by any lien, applied only to the acreage so designated, and the said "contract consumers" are denied the privilege and right to make similar annual designation of the acreage desired by them to be irrigated in the current year and by said order are required to pay substantially the same acreage rates applied to all the land in their respective ownership, whether susceptible of irrigation, or desired by them to be irrigated, or irrigated, or not, and by said order there is imposed a lien upon the whole of said lands of such "contract consumers" for the amount of all sums of money due or to become due under the terms of said order.

XIV

The Supreme Court of California erred in rendering its judgment affirming the order of the Railroad Commission of California under review, because it construed the provisions of Section 23 of Article XII of the Constitution of the State of California and the Public Utilities Act of said state and particularly Sections 17, 19 and 67 thereof as depriving it of power to review said order on the grounds of reasonableness and discrimination in the matter of classification of consumers of the water service supplied by the Sutter-Butte Canal Company as a public utility in this case where it was and is claimed in good faith by the plaintiffs in error that the order under review

violates rights of said plaintiffs in error and petitioners before said Supreme Court of the State of California, under the Constitution of the United States.

XV

The Supreme Court of the State of California erred in denying [fol. 238] the petitioners' petition for a rehearing after the decision of September 21, 1923, wherein the petitioners fully in terms and by direct reference to the Fourteenth Amendment of the Constitution of the United States and to Section 10 of Article I of the Constitution of the United States, in good faith claimed that the guarantees of the Constitution of the United States concerning the non-impairment of the obligations of contracts by subsequently passed laws of any state, the taking of property without due process of law, and the denial of the equal protection of the laws, had been violated by the decision in question as to the plaintiff in error C. W. Thresher, the plaintiff in error W. G. Coppernoll, and each of the many persons represented herein by the other plaintiffs in error and by such denial permitting said decision to become operative as to a final judgment as of October 21, 1923.

Wherefore, each of the plaintiffs in error prays that the judgment of the Supreme Court of the State of California be reversed and that the order of the Railroad Commission of the State of California, dated on the 26th day of April, 1923, be ordered annulled and that the petitioners in error and each of them may have such further relief as may be meet in the premises.

F. S. Brittain, Attorney and Solicitor for Petitioners and Plaintiffs in Error.

Filed this the 16 day of November, A. D., 1923.

[File endorsement omitted.]

[fols. 239-241] Bond on Writ of Error for $1,000—Approved and filed November 20, 1923; omitted in printing

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[fol. 242] In Supreme Court of California

[Title omitted]

Order Allowing Writ of Error—Filed November 16, 1923

The above entitled matter coming regularly on to be heard upon petition of petitioners therein for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of

California and upon examination of the petition and records in said matter and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presenting the record in said matter,

It is therefore ordered that a Writ of Error be and is hereby allowed to this Court from the Supreme Court of the United States.

It is further ordered that the plaintiffs in error give a bond with two good and sufficient sureties, for damages and costs, no supersedeas being sought or allowed and that the amount of said bond be the sum of One Thousand Dollars.

Done at San Francisco, California, this 16 day of November, 1923.

(Signed) Curtis D. Wilbur, Chief Justice of the Supreme Court of the State of California.

[File endorsement omitted.]

[fol. 243] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

WRIT OF ERROR—Filed November 20, 1923

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Chief Justice and the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in that certain cause entitled: "Live Oak Water Users' Association, Butte County Farm Bureau, Sutter County Farm Bureau, California Farm Bureau Federation, C. W. Thresher and W. G. Coppernoll, Petitioners, and Plaintiffs in Error, vs. The Railroad Commission of the State of California and Sutter-Butte Canal Company (a corporation), Respondents, and Defendants in Error," which is in said Court before you, or some of you, your court being the highest court of said state having jurisdiction to render judgment in the case, there was drawn in question the construction of and an authority exercised by the Railroad Commission of the State of California, under Sections 22 and 23 of Article XII of the Constitution of the State of California, and under that certain Act of the Legislature of the State of California, known and designated as the "Public Utilities Act," adopted in 1915, as amended in 1917 and 1919, (Statutes of California, 1915, Chapter 91; Statutes of California, 1917, Chapters 120, 137, 176, 209 and 707; and Statutes of California 1919, Chapter 303), on the ground of repugnancy to the [fol. 244] Constitution of the United States, and the decision was in favor of the exercise of authority under said provisions of the laws of said state; and, there was drawn in question the construction and application of three several clauses of the Constitution of the United States, that is to say, the clause of Section 10 of Article I of the Constitution of the United States by which the State of California is

prohibited from passing any law impairing the obligation of pre-existing contracts; the clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States by which the State of California is prohibited from taking private property without due process of law; and, the clause of said Section 1 of the said Fourteenth Amendment by which the State of California is prohibited from denying any person within its jurisdiction the equal protection of the laws, and the decision was against the rights, titles, privileges and exemptions specially set up and claimed under each of said three clauses of the constitution of the United States, etc., and there being manifest error in said decision greatly to the damage of C. W. Thresher, plaintiff in error, and each of the other plaintiffs in error joined with him, and we being willing that if there is error it should be duly corrected, we do therefore command you, if judgment be therein given, that under the seal of your court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 17th day of January, A. D., 1924, in the Supreme Court to be then and there held, that the record may be inspected by said court and justice done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 19th day of November in the Year of Our Lord One Thousand Nine Hundred and Twenty Three.

Walter B. Maling, Clerk of the United States District Court, Northern District of California, by J. A. Schaertzer, Deputy Clerk. (Seal of the U. S. District Court, Northern District of California.)

[fol. 244½] [File endorsement omitted.]

[fols. 245 & 246] Citation—In usual form, showing service on Hugh Gordon et al.; filed November 20, 1923; omitted in printing

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[fol. 247] In Supreme Court of California

[Title omitted]

Order on Stipulation for Transcript of Record

Upon the Stipulation and Joint Præcipe of counsel for all parties in the above cause, it is hereby ordered that the foregoing record to which all parties represented by their respective counsel have agreed, together with the Remittitur in the case shall be copied and certified to the Supreme Court of the United States as the record.

Dated May 20, 1924.

Louis W. Myers, Chief Justice of the Supreme Court of the State of California.

IN SUPREME COURT OF CALIFORNIA

CLERK'S CERTIFICATE

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record, assignment of errors and proceedings had in Cause No. S. F. 10,299 wherein Live Oak Water Users' Association, Butte County Farm Bureau, Sutter County Farm Bureau, California Farm Bureau Federation, C. W. Thresher and W. G. Coppernoll are complainants, and The Railroad Commission of the State of California and Sutter-Butte Canal Company (a corporation) are defendants, as the same were designated and condensed by the stipulations of counsel with the permission of the Supreme Court of the State of California.

[fol. 248] I further certify that said transcript comprises all the several proceedings, files, writs, opinions, orders and decrees and other papers designated by counsel for the respective parties in their Joint Præcipe and Stipulation as being necessary to a hearing and determination of said cause by the Honorable, The Supreme Court of the United States.

Witness my hand officially and the seal of said Court at San Francisco the 16th day of May, A. D. 1924.

B. Grant Taylor, Clerk, by I. M. Johnson, Deputy Clerk.
(Seal of the Supreme Court of California.)

Endorsed on cover: File No. 30,368. California Supreme Court. Term No. 409. Live Oak Water Users' Association, Butte County Farm Bureau, Sutter County Farm Bureau, et al., plaintiffs in error, vs. The Railroad Commission of the State of California and Sutter-Butte Canal Company. Filed May 26th, 1924. File No. 30,368.

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In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1925

No. 73

LIVE OAK WATER USERS' ASSOCIATION, BUTTE COUNTY FARM BUREAU, SUTTER COUNTY FARM BUREAU, et al.,
Plaintiffs in Error,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and SUTTER-BUTTE CANAL COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

Upon Writ of Error to the Supreme Court of the State of California.

F. S. BRITTAIN,
Balboa Building, San Francisco, California,
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Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 73

LIVE OAK WATER USERS' ASSOCIATION, BUTTE COUNTY FARM BUREAU, SUTTER COUNTY FARM BUREAU, et al.,
Plaintiffs in Error,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and SUTTER-BUTTE CANAL COMPANY,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

Upon Writ of Error to the Supreme Court of the State of California.

Prefatory Statement.

The plaintiffs in error maintain that by the judgment of the Supreme Court of California the obligations of their contracts have been impaired, that their property has been taken without due process of law, that they have been denied the equal protection of the laws, and that the California Court has denied and renounced its power to protect the plaintiffs in error in their claims of rights,

privileges and immunities secured by the Constitution of the United States.

To avoid any possible first impression that this case rests upon the familiar complaint of the action of a public service commission acting within its powers in fixing rates for public utility service alleged to be unfair or unreasonable, the plaintiffs in error desire it to be known that they rest their case upon the following principles of law which they believe to be axiomatic:

1. *The State of California, by its Railroad Commission, has unquestioned power to fix, as a matter of law, uniform rates for water furnished and service rendered by a public utility water company;*

2. *That power may be exerted at any time notwithstanding any provision of any private contract between the water company and any of its customers;*

3. *The rates fixed as a matter of law by the State in the proper regulation of the public utility's dealing with the general public supersede all provisions for charges contained in such contracts; and, after the exertion by the State of the power to fix rates none of the contractual obligations dependent upon or connected with the consideration upon which the contractual rates were fixed have any further force;*

But,

4. *The State of California has no power, under any law, nor through any agency, to change the terms of such a contract, nor to insert in it the utility rates fixed by law; the State may set aside the provisions of the contract relating to service and rates, but it cannot both relieve the utility company of the contractual obliga-*

tion to furnish water at the contractual low rate, and, at the same time hold the other party bound by the contract to pay the higher rate fixed as a matter of law, nor for water not furnished or service not rendered; neither can it impose a lien on his land to secure the payment of money to become due under the law at the higher public utility rates, when he had contracted only that money to become due under the contract should be secured by lien upon his lands;

5. *The State of California has no power under any existent law to secure the payment of public utility rates fixed by its Railroad Commission for water service by a lien, not imposed by agreement, attachment or judgment, on the lands of any customer of a public utility serving water to the general public;*

6. *The State has no power by an order of its Railroad Commission in a rate proceeding instituted by a public utility water company to require any member of the general public to accept service undesired, or to pay for water not furnished or service not rendered;*

7. *The State, acting by its Railroad Commission, has no power to classify the general public served by a public utility water company into contract holding and non-contract holding consumers, and upon no difference in the character of the service, give to those in the non-contract class privileges and advantages denied to those in the contract class, by permitting the favored class to pay only for service rendered while requiring the others to pay for service whether rendered or not, and by imposing a continuing lien upon the lands of the contract class for the excessive and confiscatory*

rates, while the lower and preferential rates of the non-contract class are secured by no such lien; and,

8. *The State of California has no power, under any law, to deprive the Supreme Court of power to determine whether a decision of the Railroad Commission of that State violated the rights of any person within its jurisdiction claimed under the guarantees of the Constitution of the United States.*

In this brief it will be shown that through manifest error the judgment under review purporting to be based upon the three principles of law first above stated, did violence to each of the others.

Official Reports of Opinions.

In the State of California, there are two official reports of opinions of the Supreme Court. For many years there have been published in pamphlet form, issued semi-weekly, the "California Decisions" designated as "The Official Organ of the Supreme Court of the State of California", the editor being the official reporter of the Supreme Court. The opinions are also published in the bound California reports.

The official reports of decisions of the Railroad Commission of the State of California are published in bound form under the title "Opinions and Orders of the Railroad Commission of California".

The plaintiffs in error as petitioners sued the defendants in error as respondents in the Supreme Court of the State of California, to review a decision of the Railroad Commission of that State in a proceeding before the Railroad Commission in which the records in a prior pro-

ceeding before the Commission, by stipulation were made part of the record. The Supreme Court of California first rendered and entered a judgment annulling the decision of the Railroad Commission. On rehearing granted on the petition of the respondents, the Supreme Court made an order vacating the judgment annulling the decision of the Commission, and rendered and entered a judgment affirming that decision.

The opinions have all been officially reported as follows:

1. The second opinion of the Supreme Court of California upon which the judgment to be reviewed was entered is reported under the title of Live Oak Water Users' Association, et al., petitioners vs. The Railroad Commission of the State of California, respondents, in Volume 192, California Reports, pages 132-144.

It is to be noted that in the title so reported, the name of the Sutter-Butte Canal Company, the second of the two respondents, was omitted. In the original official report, the correct title of the case appears. That report is in Volume 66, California Decisions, pages 408-414. For the convenience of the Court, the opinion is printed in the record. (R. 135-142.)

2. The first opinion rendered by the Supreme Court of California on which judgment annulling the decision of the Railroad Commission was entered is officially reported under the correct name of the case in Volume 65, California Decisions, pages 69-76. This opinion, also by stipulation, is printed in the record. (R. 81-90.)

3. The decision of the Railroad Commission affirmed by the final judgment in the Supreme Court of California, is reported in Volume 21, Opinions and Orders of the

Railroad Commission of California, pages 623-637. A copy of that decision was appended to the petition for a writ of review as Exhibit A and is printed in the record. (R. 12-29.)

4. In both the decision of the Railroad Commission and the opinion of the Supreme Court, reference is made to a prior decision of the Commission. It is reported in Volume 15, Opinions and Orders of the Railroad Commission of California, pages 425-459. By stipulation so much of that decision as is pertinent to the present controversy appears in the record. (R. 38-52.)

Grounds of Jurisdiction.

THE JUDGMENT TO BE REVIEWED.

The judgment to be reviewed was rendered September 21, 1923 (R. 135-142), and was entered the same day. (R. 157.)

CLAIMS ADVANCED AND RULINGS MADE.

In a rate proceeding instituted by the Sutter-Butte Canal Company before the Railroad Commission of the State of California, it rendered a decision in 1918, reciting the terms of the contracts in question here, and fixing rates and rules of service to be applied by the water company under that decision.

In a later and similar proceeding, in which the water company sought authority again to increase its rates, the record and decision in the prior proceeding by stipulation were incorporated in the record. (R. 37-38.) So much of the prior decision as is pertinent to the present case is in the record here. (R. 38-53.)

In the later proceeding, it appeared that the Sutter-Butte Canal Company had interpreted the earlier decision of the Commission in such a way that while new and non-contract consumers might annually designate what portion of their lands, if any, they desired to irrigate during the ensuing year, and were required to pay flat acreage rates only on the land so designated, the contract consumers were denied the privilege of making such designation, and were required to pay substantially the same acreage rates applied to all the land they respectively owned whether water should be served to it or not. This interpretation of the earlier decision the plaintiffs in error believed was unwarranted, and moved the Commission to interpret its prior decision.

In its decision in the later case (R. 13-29) the Commission determined in substance that the consumers of the water company had been and were classified as "non-contract" and "contract" consumers, and that the interpretation placed by the water company upon the earlier decision should be established.

The plaintiffs in error applied in writing to the Commission for rehearing (R. 29-33), which was denied. (R. 35.)

The plaintiffs in error then commenced their suit in the Supreme Court of the State of California, by filing a petition for a writ of review. (R. 3-12.) The writ was granted. (R. 35.) The record before the Railroad Commission was certified to the Supreme Court, and it constituted the only evidence before that Court. (R. 36-81.)

The Supreme Court rendered a judgment annulling the decision of the Railroad Commission (R. 81-90), upon

which judgment in favor of the plaintiffs in error was entered and subsequently vacated (R. 134), upon petitions of the defendants in error. (R. 90-100.) The plaintiffs in error filed in the Supreme Court their written opposition to the rehearing. (R. 108-116.)

The rehearing being granted the plaintiffs in error filed a writing designated "Authorities on Jurisdiction". (R. 116-128.)

The Supreme Court rendered a new judgment affirming the decision of the Commission (R. 135-142), on which the judgment to be reviewed was entered. (R. 157.)

Within thirty days, and before the second judgment became final, the plaintiffs in error in writing petitioned the Supreme Court for rehearing (R. 143-156), which was denied. (R. 157.)

The specific claims made by the plaintiffs in error were as follows:

1. In the later proceeding before the Railroad Commission, the attorney for the plaintiffs in error requested an interpretation of the Commission's earlier decision relating to the contracts. (R. 58.) The matter was argued orally. (R. 58-81.) During the course of the argument, the attorney for the plaintiffs in error moved the Commission to declare "in terms not susceptible of misinterpretation, whether or not, under pre-existing contracts, or otherwise, the Sutter-Butte Canal Company may exact advance payments, or any payments for water service under existing rates, based upon flat rates applied to acreage not irrigated, and not to be irrigated". (R. 66.) Further, during said argument, the attorney for the present plaintiffs in error stated "the Commission has no

power to interfere in any way with the pre-existing contracts". (R. 69.) Again, "the Commission is absolutely without power, the Supreme Court of the United States is without power, and has frequently said it is without power, as our own Supreme Court has said, where a contract is non-severable, to make a new contract which the parties themselves never entered into". (R. 72.) During the hearings in said proceeding, no ruling was made on the foregoing matters, the ruling being reserved until the decision of the entire proceeding. (R. 80.)

The ruling was that "to the extent that the rates for water are changed by the orders of the Railroad Commission, these contracts are modified or reformed but not wholly superseded or abrogated". (R. 14.) Further, that the Commission classified the so-called contract holders into a separate class of consumers and that except as to the change in rates, the contracts remained in full force and effect. (R. 14.)

2. In the application for rehearing addressed to the Railroad Commission, the present plaintiffs in error claimed that when the State undertook to regulate the sale of water, all provisions of the contracts concerning rates to be charged and service to be rendered were within the control of the Commission as to water actually used, and that neither the Commission nor any other tribunal has power to make an entirely new contract or to change the consideration for an existing contract to which the parties had not agreed. They cited Section 10 of Article I of the Constitution of the United States in support of that claim. (R. 32.) They further claimed that the decision of the Commission purported to fix rates to be charged against the individuals for utility service

in excess of the utility service rendered, in violation of the Fourteenth Amendment to the Constitution of the United States. (R. 30.) The ruling on these claims was adverse in the denial of the application for rehearing. (R. 33-34.) This ruling was merged in the affirmance of the order by the judgment here to be reviewed. (R. 137.)

3. In the petition addressed to the Supreme Court of California for a writ of review, the present plaintiffs in error claimed that the determination of the Railroad Commission that they must pay for the entire acreage irrigated irrespective of the use of water, and the determination of the Commission to treat the contract holders as a separate class, and as to them apply the increased rate to the entire acreage under contract, was each beyond the jurisdiction of the Commission. (R. 11.) The final ruling of the Supreme Court of California thereon was that the Commission had acted within its jurisdiction in increasing the water charges applicable to each and every acre owned by the contract holders (R. 138); that the classification was a legitimate exercise of the power of the Commission, that it was not arbitrary or unreasonable, that the findings and conclusions of the Commission on the questions of reasonableness and discrimination are not subject to review by the Supreme Court of California, and affirming the decision of the Commission.

4. In the opposition to rehearing after the rendition of the first judgment of the Supreme Court, the present plaintiffs in error claimed that the State had no power to change the obligations of the contract (R. 113), nor to classify the consumers as contract holders and non-contract holders. (R. 115.) The ruling was the granting of the rehearing. (R. 134.)

5. In the "Authorities on Jurisdiction" filed on the rehearing, the plaintiffs in error claimed that the obligations of their contracts were impaired, that the imposition of the liens constituted a taking of their property without due process of law, and, that by the classification made they were denied the equal protection of the laws, in violation of the Constitution of the United States. (R. 116, 118, 120, 125, 126.) The ruling was the affirmance of the decision of the Commission, and the determination of the Supreme Court of California, that it had no power to review the decision of the Commission on the questions of discrimination and classification. (R. 139.)

6. In the petition for rehearing after the rendition of the second judgment the plaintiffs in error claimed that under Section 10 of Article I of the Constitution of the United States, the State of California never has had power to pass any law impairing the obligations of the pre-existing contracts; that if Section 23 of Article XII of the Constitution of California or Section 67 of the Public Utilities Act of that State must be construed as apparently they had been construed by the Supreme Court of California, both those provisions were invalid; and, that it is not only within the power of the Supreme Court of California, but that it was its duty, to declare such invalidity; they also claimed that no State shall deprive any person of any property without due process of law nor deny to any person within its jurisdiction the equal protection of the law under Section 1 of Article XIV of the Constitution of the United States. (R. 143-144.) The ruling of the Supreme Court of California was to deny said petition for rehearing. (R. 157.)

STATUTORY PROVISIONS UNDER WHICH JURISDICTION IS INVOKED.

The record in this case has been ordered certified (R. 176) and certified (R. 177) upon stipulation of the parties, who agreed upon a joint praecipe. (R. 1-3.) The certified record shows on its face that every step has been taken regularly and within the time provided by statute or the rules of this Court, except that the record was filed May 26, 1924 (R. 177) while the writ of error directed return to be made on January 17, 1924. (R. 176.)

By written stipulations and orders signed by the Chief Justice of the Supreme Court of California upon such stipulations, the time was extended for the filing of said transcript, pending the agreement of the parties to the joint praecipe, until June 1, 1924. Because of the foregoing facts it is deemed unnecessary here to refer to the statutes and rules relating simply to procedure. The stipulations and orders extending time are not included within the record. There is no reason to anticipate that their existence will be questioned, but should any question be raised in regard thereto, on behalf of the plaintiffs in error, leave is now asked to suggest a diminution of the record, with leave to file with the Clerk of this Court certified copies of said original stipulations and orders now on file in the office of the Clerk of the Supreme Court of California.

The jurisdiction of this Court rests on Section 237 of the Judicial Code as it was on November 16, 1923, when the writ of error was allowed. (R. 174-175.) So much thereof as is pertinent is as follows:

> "A final judgment * * * in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity

of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, * * * of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. * * *

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, * * * where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution * * * of the United States, and the decision is against their validity; or where any title, right, privilege or immunity is claimed under the Constitution, * * * and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, * * *.

"In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest court of a State in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

REFERENCE TO CASES IN SUPPORT OF JURISDICTION.

The Decision of the Railroad Commission is a State Law, Within the Meaning of Section 237 of the Judicial Code.

"Any enactment, from whatever source originating, to which the State gives the force of law, is a statute of the State, within the meaning of the pertinent clause of

Section 709, Rev. Stat., Judicial Code, Sec. 237; which confers jurisdiction on this court. Williams v. Bruffy, 96 U. S. 176-183."

Atlantic etc. R. Co. v. Goldsboro, 232 U. S. 548-555;

Arkadelphia etc. Co. v. St. Louis etc. Co., 249 U. S. 134-141.

No Particular Form of Words or Phrases is Necessary in Order to Assert Federal Claims.

Green Bay etc. Co. v. Patten Paper Co., 172 U. S. 58-67;

Dartmouth College v. Woodward, 4 Wheat. 518-663-665.

The Insistence of the Plaintiffs in Error Upon Their Constitutional Rights in the Application to the Railroad Commission For Rehearing Was Timely.

"In general, a party may wait until a law is passed or regulation is made and then insist upon his constitutional rights. Prentis v. Atlantic Coast Line Co., 211 U. S. 210-227-229."

San Joaquin, etc., Co. v. Stanislaus Co., 233 U. S. 454-459.

Petition to the State Supreme Court for a Writ of Review Was the Only Method of Redress Afforded by the State Statutes.

California Public Utilities Act, Sec. 67.

The Judgment of the Supreme Court of California Did Not Become Final and Effective for Thirty Days After its Entry, Hence, the Federal Claims Set up in the Petition for Rehearing in That Court Were in Time.

"The decision on the appeal was filed December 6, 1915, and became absolutely final and beyond our control thirty days thereafter."

Oakland v. Pacific Coast, etc. Co., 172 Cal. 332-337;

Prentis v. Atlantic, etc. Co., 211 U. S. 210-227.

The Federal Questions Were Properly Raised if it Appear From the Record by Clear and Necessary Intendment That They Must Have Been Directly Involved.

"Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding, either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law."

Kaukauna v. Green Bay, etc. Co., 142 U. S. 254-269;

Powell v. Brunswick County, 150 U. S. 433-440;

Furman v. Nichol, 8 Wall. 44-56.

The Federal Right May Be Denied As Well By Evading a Direct Decision Thereon As By Positive Action.

"If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Chapman v. Goodnow's Administrator, 123 U. S. 540-548;

Yazoo, etc., Ry. Co. v. Adams, 180 U. S. 1-15.

The State Court Could Not Dispose of the Federal Claims by Construing the Contract to Bring it Into Harmony With Legislation Enacted Subsequent to the Making of the Contract.

"The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in the form of expression than in the

character of the question involved, and this court has so frequently decided, notably in the very recent case of McCullough v. Virginia, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer an open question."

Columbia W. Power Co. v. Columbia etc. Co., 172 U. S. 475-487;

New Orleans etc. Co. v. Louisiana Sugar etc. Co., 125 U. S. 18;

Bridge Proprietors v. Hoboken Co., 1 Wall. 116;

Columbia Railway etc. Co. v. S. Carolina, 261 U. S. 236-245;

Houston etc. R. Co. v. Texas, 177 U. S. 66-77.

The State of California Could No More Impair the Existing Contracts by Amending Its Constitution Creating the Railroad Commission Than It Could by the Adoption of the Public Utilities Act, or by the Decision of the Railroad Commission Purporting to Have Been Made Pursuant to the Constitutional Amendment and the Public Utilities Act.

"It is well settled by the adjudications of this court, that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibition they are substantially the same thing."

White v. Hart, 13 Wall. 646-652;

Gunn v. Barry, 15 Wall. 610;

Town of Concord v. Portsmouth etc. Bank, 92 U. S. 625;

Ede v. Knight, 93 Cal. 159-161.

The Imposition of the Liens For Sums to Become Due as a Matter of Law as Distinguished From Sums "To Become Due Under the Contract" Constituted a Taking of Property Within the Meaning of Section 1 of the Fourteenth Amendment.

"The taking by a State of the private property of one person or corporation, without the owner's consent, for

the private use of another, is not due process of law."

Missouri Pacific R. Co. v. Nebraska, 164 U. S. 403-417.

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be 'Obsta Principiis'."

Boyd v. U. S., 116 U. S. 616-635.

The Segregation of the Contract Holders Into One Class Required to Pay Flat Acreage Rates Applied to Their Entire Land Holdings and Subjecting Those Holdings to a Lien For Such Rates, and all Other Consumers Into Another Class Paying Acreage Rates Only on the Number of Acres Annually Designated by Them For Irrigation and Without Any Provision for a Lien Was an Arbitrary and Unreasonable Classification in Violation of the Provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States Prohibiting the State of California From Denying to Any Person Within Its Jurisdiction the Equal Protection of the Laws.

"The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural."

Nicol v. Ames, 173 U. S. 509-521.

"Arbitrary selection can never be justified by calling it classification."

Gulf etc. Ry. Co. v. Ellis, 165 U. S. 150-159;

Magoun v. Illinois Trust etc. Bank, 170 U. S. 283-294.

"That principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination."

Western Union etc. Co. v. Call Publishing Co., 181 U. S. 92-100.

The State of California Could Not Divest the Supreme Court of California of Power to Determine the Federal Questions Necessarily Involved in This Case.

"Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State Courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.' If they fail therein, or withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided, to this court for final and conclusive determination."

Robb v. Connolly, 111 U. S. 624-637.

Statement of the Case.

A judgment of the Supreme Court of the State of California affirming a decision of the Railroad Commission of that State in a proceeding instituted by the Sutter-Butte Canal Company to obtain an increase of public utility water rates fixed by the Commission, is brought here for

review by a writ of error, allowed by the Chief Justice of the Supreme Court of the State of California upon a petition filed by C. W. Thresher and W. G. Coppernoll, individuals, and the other plaintiffs in error, associations representing individuals similarly situated. (R. 157-165.)

By Section 1 of Article XIV of the Constitution of the State of California, adopted in 1879, the use of all water appropriated for sale, rental or distribution was declared to be a public use and subject to the regulation and control of the State in the manner to be prescribed by law. (R. 161.)

The Supreme Court of California long since determined that the power to fix rates for such water is a necessary incident of the reserved power to regulate and control the use. It also long since determined that until the State by law prescribed the manner of the use and exercised the incidental power to fix rates for such water, the appropriators of water might lawfully contract with those to whom such water was served upon any terms on which the parties might agree.

The water supplied by the Sutter-Butte Canal Company was appropriated by its predecessor in interest in 1902. (R. 40.) Through mesne transfers, the rights and obligations of the original appropriator passed to the present Sutter-Butte Canal Company in 1911. (R. 40.)

The State of California did not in any way, nor under any law, exercise any control, or seek to regulate the use of the water involved in this proceeding, nor to prescribe rates for its use until long after 1913. Between 1902 and 1911, a predecessor in interest of the Sutter-Butte Canal Company entered into the contracts involved here with

owners of various tracts of land within the area now served with water by the Sutter-Butte Canal Company. (R. 135; R. 41-42; R. 52-53.) Concerning the matters involved here the contracts were substantially in the same form.

The contract of C. W. Thresher, one of the plaintiffs in error, was dated June 24, 1904, and applied to 625 acres of land owned by him. It provided that for a period of eleven years he should pay annually at the rate of $1.50 an acre for each of the 625 acres and after the expiration of that period, he should pay annually at the rate of $1.00 an acre for each of the 625 acres. (R. 161; R. 71-72.) This contract, as others, provided mutual obligations of the appropriator of the water and the consumer in regard to the construction and maintenance of ditches, that the canal company should furnish water at the rate of one thousand cubic feet per second (R. 53; R. 41), for each 160 acres of the land described in the contract, that the canal company might take over without paying additional compensation the ditch constructed by the consumer, that the canal company should have a right of way through the consumer's lands and a right of entry thereon, that the water covered by the contract should be appurtenant to the land described in the contract (R. 41), and, that

> "all amounts becoming due under this contract shall be promptly paid when due, but if for any cause they should remain unpaid, they shall draw interest at the rate of seven per cent. per annum, compounded annually, if any amount thereunder shall remain due and unpaid for a space of six months, the party of the first part may thereafter at any time while said amounts remain due and unpaid, upon written notice to the owner of said lands, release itself from further obligations to deliver water under this contract.

"It is further understood and agreed, that *all sums due or to become due under this contract* in favor of the party of the first part *shall be and become a lien upon the lands herein described,* and may be foreclosed as any other lien including costs and charges and all necessary and reasonable expenses, and attorney's fees connected therewith." (R. 42.)

The parties operated under these contracts without disagreement until 1918. (R. 136-137.) In 1911, the State of California by an amendment to its Constitution, known as Section 22 of Article XII, created the Railroad Commission of that State, and in 1914 by a further amendment to said Constitution, known as Section 23 of Article XII, it extended the powers of the Railroad Commission to regulate and control all public utilities, and in and by said amendment purported to vest in the Legislature of California plenary powers, unlimited by any other provision of said Constitution, to confer other and additional powers on said Railroad Commission. (R. 161.)

In 1915, the Legislature adopted an act designated as the "Public Utilities Act", which act was from time to time thereafter amended, and the Railroad Commission has no powers other than those flowing from said last mentioned two sections of the Constitution of California and said Public Utilities Act, at least in regard to any matter involved in this controversy.

All the contracts involved here were entered into before the Railroad Commission was created.

The Sutter-Butte Canal Company from its inception was a public utility and as such became subject to the supervisorial control of the Railroad Commission by virtue of Section 23 of Article XII of the Constitution of

California adopted in 1914 and the provisions of the Public Utilities Act.

By stipulation in the proceedings before the Railroad Commission, the entire record in a similar proceeding was made a part of the record. (R. 38.) In the prior proceeding, the Railroad Commission, in 1918, in its decision stated the terms of said contracts (R. 39-42), to which statement by further stipulation additions were made for the purpose of the record here (R. 52-53).

In said decision rendered in 1918, the Railroad Commission, after analysis of said contracts, stated:

"Under the present rates, one consumer may be paying $1 annually per acre while his neighbor is paying $1.50 or $2 per acre for the same service. This discrimination is due to the fact that the predecessor of the Sutter-Butte Canal Company issued contracts providing for a $1 and a $1.50 rate, while the Canal Company issued its contracts for $2 for the same class of service. That the Commission cannot permit this discrimination to continue is obvious.

"The rates to be established in this proceeding must be uniform and non-discriminatory in their application.

"The revenue of this company will be materially reduced by the elimination of the area which has heretofore been paying an annual charge but has not used water for irrigation, and which does not carry the initial charge payment.

"This phase was discussed by Commissioner Thelen in Decision No. 4478, In the matter of the Application of Madera Canal and Irrigation Company for an order authorizing increases in rates charged for water sold for irrigation, Application No. 2381, decided July 23, 1917, who states in part as follows:

" 'This Commission has jurisdiction to establish the rates to be paid for water sold by a public utility or the rate to be paid by a customer desiring to establish the relationship of customer and utility (a minimum rate for

readiness to serve), but not a rate to be paid by a person who does not desire to purchase water or to be placed in the status of customer of a public utility water company with the right to call on the utility for water whenever he desires to do so.'" (R. 46.)

In that decision it was determined by the Commission that in the year 1917 out of the total of 41,321 acres charged for irrigation, 5,321 acres were not irrigated and that out of the total $124,610 collected by the company, $9,527 were collected for water never served. (R. 45.)

After further discussion of the subject, in said decision the Railroad Commission established three schedules of rates applicable to different classes of service and directed the Sutter-Butte Canal Company to file and put into effect revised rules, regulations and contracts to conform with the findings of the Commission. (R. 51-52.) Pursuant to said decision, the Canal Company filed such rules and regulations, which were thereafter approved by the Commission, and so far as they are pertinent to the controversy in the present case, they provide:

"1. Applications for water must be made on the printed forms of the company and filed with the company not later than January 1st of the year in which service is desired, except that in case it is necessary to construct, extend or enlarge any ditch in order to serve, application must be made on or before October 1st preceding the year in which service is desired. * * *

"2. Consumers must notify the company in writing before the above mentioned dates if service is to be discontinued for the following irrigation season. The consumer will be charged and shall pay at the regular rate until such notice is received. The foregoing as to discontinuance of service does not apply to holders of contracts for continuous furnishing of water." (R. 53-54.)

Then follows the schedules generally in accordance with the decision. (R. 54-57.)

Then follows:

"4. Payments for service under the schedule of flat rates and the minimum payments of the measured rate schedule are due and payable as provided above and before service is rendered. If not paid as provided, the company may discontinue service after thirty days' written notice. Service will not be restored until the amount due is paid, together with interest at the rate of 8% per annum, and credit is established as herein provided." (R. 57.)

* * * * * * * * *

"17. Water must be used only on the area described in the application. For violation of this rule, water will be turned off and service will not be restored until payment is made at the established rates for the area described in the application, plus other areas irrigated." (R. 57.)

The Supreme Court of California in its decision said:

"Certain of these contract customers, upon the putting into effect of said order, protested against the Canal Company's interpretation of the same and offered to pay the company at the rate set forth in its said order as affecting them, for each year, according to the number of acres upon which each of said contract customers desired to use water for irrigation during that year, but the company at all times refused to accept said offer and demanded and received payment of the rates so established upon the entire acreage of each of said contract holders." (R. 137.)

The form of the application for annual water service on behalf of non-contract consumers, and sought to be used by the contract consumers, appears in the record. (R. 34-35.)

Relying upon the stipulation making the record in said prior proceeding a part of the record in the proceeding

subsequently reviewed by the Supreme Court of California, the present plaintiffs in error and particularly the individual plaintiffs in error by their attorney requested the Commission to construe its own decision of 1918. The matter was argued at length. (R. 58-80.) During the course of the argument, the attorney for the plaintiffs in error formally moved the Commission to declare in terms not susceptible of misinterpretation whether or not, under pre-existing contracts or otherwise, the Sutter-Butte Canal Company may exact advance payments, or any payments for water service under existing rates, based upon flat rates applied to acreage not irrigated and not to be irrigated. (R. 66.) Further, in the course of said argument, the attorney for the plaintiffs in error urged that the Railroad Commission had no power to make a new bargain for these people, that it might fix the rates for water service but that the contract is non-severable and the consideration for it cannot be separated from the onerous conditions laid on the consumers. (R. 71-72.) No ruling was made on the foregoing matters during the hearings, but was reserved until the decision of the Commission of the entire proceeding (R. 80), which decision was that reviewed by the Supreme Court of California. In that decision (R. 13-34) the Commission said:

> "It is well settled in this State that contracts of this sort are subject to revision. To the extent that the rates for water are changed by the orders of the Railroad Commission these contracts are modified or reformed but not wholly superseded or abrogated. Other provisions of such contracts may remain in full force and effect." (R. 14.)

Referring to the former decision of the Commission, from which quotations have been made, the decision re-

viewed by the Supreme Court of California determined that the former order provided for three distinct classes of rates:

"1. A flat rate for consumers not holding contracts.

2. A measured rate to apply where meters were installed.

3. A flat rate for holders of contracts.

"The order clearly shows that the contract holders were treated as a separate class of consumers and the Commission deemed that, except as to the change in rates, the contracts remained in full force and effect.

"If the entire system were metered, as has been recommended by the Commission, and all water was paid for on a measured basis, a situation might be presented which would justify the elimination of the annual acreage charge on unirrigated lands. Under present conditions, however, we believe that this charge is justified, and the Commission will not, therefore, prescribe a rate which will supersede this provision of the contract." (R. 14-15.)

Measuring devices are not installed on this system. (R. 51.)

In the decision of the Commission affirmed by the California Court, it was said:

"It will be noted that the general form of the rate schedule herein established is the same as that at present in effect, providing for three classes of rates, namely:

1. Flat rates for consumers not holding contracts.

2. Measured rates to apply where meters are installed.

3. Flat and measured rates for certain contract holders.

"The advantage and advisability of a measured system of delivery is clearly set out in Decision No. 5226 of this Commission, wherein the rates at present

in effect were established. However, it was not deemed advisable, under present conditions and with the present development of the system, to alter, in this proceeding, the form of the rate schedule or its application to contract holders, with one exception: The consumers on the Sutter County extension, who are obligated under special contract to use water for rice irrigation for the period of three years, will be charged on the non-contract schedule. * * * " (R. 24-25.)

Then follows the new schedules of increased rates. (R. 26-29.)

In the application for rehearing, addressed to the Railroad Commission, and in the petition for the writ of review addressed to the Supreme Court of California, plaintiffs in error set forth their Federal claims.

The Supreme Court of California first annulled the order of the Railroad Commission and decided in substance that the claim of the plaintiffs in error under Section 10 of Article I of the Constitution of the United States was important only because by the change, the rates established by the order of the Commission were grossly discriminatory and that the segregation of the holders of the contracts into a separate class based solely upon the fact of the existence of the contracts was arbitrary and beyond the powers of the Commission. (R. 81-90.) The judgment entered upon that decision was vacated upon the petitions of the present defendants in error for rehearing.

In the opinion on which judgment is now under review, it was stated that:

"The sole question is whether or not these rates should be applied to the full acreage covered by the contracts or only to the acreage actually irrigated, as-

suming the contract holder does not desire to irrigate all the land covered by his contract." (R. 135.)

Again, after referring to the claims made before the Railroad Commission concerning the interpretation of its former decision, the Court said:

"In dealing with said contention the Railroad Commission expressly held that the interpretation placed by the Canal Company upon its said former order was correct and in substance held that with the exception of its admitted power over the regulation of the water rates of said public utility, it had no power to abrogate or interfere with the obligations of said contracts. It accordingly, by its decision and order, made a general increase in the water rates of the Canal Company, substantially in the form of its previous order, but with the express ruling that as to the acreage of contract holders to be affected by such increase, the provisions of their contracts should remain in full force and effect." (R. 137.)

Again,

"The Railroad Commission did not attempt to change, limit, modify or abrogate any of the provisions of said contracts. A decision on the question of liens, as well as other questions of a purely legal character, was reserved by the Railroad Commission for adjudication by the courts. Acting within its unquestionable jurisdiction, it did increase the water rates by the adoption of a uniform rate which was made applicable to each and every acre owned by the contract holders." (R. 138.)

Again,

"The power of this Court to review the orders and decisions of the Railroad Commission are expressly limited by constitutional provisions." (R. 138.)

Then quoting from Section 23 of Article XIV of the Constitution of California:

"The right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby *declared to be plenary and to be unlimited by any provision of the Constitution.* * * * " (Italics those of the Supreme Court of California.) (R. 139.)

Then quoting from Section 67 of the Public Utilities Act, concerning the limit of the jurisdiction of the Supreme Court of California:

" * * * The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including the determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. *The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review;* such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on *reasonableness* and *discrimination.*" (Italics those of the Supreme Court of California.) (R. 139.)

The Supreme Court of California then decided:

"The above cited article of the Constitution and sections of the Public Utilities Act are conclusive upon the question that the Railroad Commission's decision and order in the instant case on the question of discrimination and classification is not subject to annullment by this Court." (R. 139.)

Again,

"It is true that any sums which became due for water services became a lien upon the lands and might be foreclosed as such, but this provision was a part of a contract freely entered into." (R. 140.)

Again,

"The Commission further found from the record before it that a compliance with petitioner's request to relieve a large acreage from water-rate payments contrary to their agreements would have reduced the

revenues of the Canal Company to a dangerous if not ruinous point and probably would have seriously crippled if not defeated plans for present and future developments that were essential to the welfare of all concerned." (R. 140-141.)

Again,

"Petitioners have shown no violations of the provisions of Section 19 of the Public Utilities Act, which provides that no public utility shall make or grant any preference or advantage to any corporation or person, or subject any person or corporation to any prejudice or disadvantage, or establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect as between classes of service. It will be noted that this section provides that the Commission shall have the power to determine any question of fact arising under said section." (R. 141.)

Again,

"There is no claim made that the rates established by the Railroad Commission were confiscatory or oppressive." (R. 142.)

Again,

"The Railroad Commission undoubtedly had jurisdiction to make the order under review. Its classification for the purpose of rate fixing was a legitimate exercise of its power. As a matter of law, it cannot be said that it was arbitrary or unreasonable. But, however this may be, its findings and conclusions on questions of 'reasonableness and discrimination' are not subject to review by this Court.

"The order is affirmed." (R. 142.)

Specification of Assigned Errors to be Urged.

The plaintiffs in error rely upon four Federal claims, and specify the assigned errors to be urged in regard thereto as follows:

First, that the contracts have been changed and the obligations thereof impaired, and in connection therewith

Assignments 1, 2, 4, 13 and 15 will be urged. (R. 166, 167, 172, 173, 174.)

Second, that the liens imposed on the contract holders' lands constituted a taking of their property, and was without due or any process of law, and in connection therewith Assignments 4, 5, 6, 13 and 15 will be urged. (R. 167, 168, 172, 173, 174.)

Third, that the classification between non-contract and contract consumers is arbitrary, and constituted a denial of the equal protection of the laws to the so-called contract consumers, and in connection therewith Assignments 5, 7, 8, 9, 13 and 15 will be urged. (R. 167, 168, 169, 170, 172, 173, 174.)

Fourth, that the Supreme Court had jurisdiction to determine every claim of the plaintiffs in error under Article VI of the Constitution of the United States, and in this connection all the assignments of error and particularly Assignments 9, 10 and 14 will be urged. (R. 165-174.)

Summary.

At a time before the State of California undertook to exert its admitted power to regulate the use of water and by law to fix public utility rates therefor, the predecessor of the Sutter-Butte Canal Company entered into lawful private contracts with various individuals providing for constructing and maintaining ditches, rights of way over lands of the individuals, and many other things. The purveyor of the water by the contracts undertook to supply to the ditches of each landowner a fixed quan-

tity of water per second, for which the landowner agreed to pay annually a low rate per acre applied to the entire acreage of his land, whether it was irrigable or not, and whether or not in any year he should desire to irrigate the entire irrigable land. The contract further provided that "*money coming due under the contract*" should be secured by a lien on the entire tract of land described in the contract.

Each contract was made in view of, and impliedly incorporated, the then existent provisions of law to the effect that notwithstanding any terms of the contract the State might at any time exercise its reserved and sovereign power, by law thereafter to be prescribed, to take over the entire control and regulation of the use of water, and incidentally to fix by law uniform and reasonable rates to be paid for such use. Each contract was also made in view of the then existent provision of law that no lien to secure a particular obligation could be held to secure any other or different obligation.

Long after the contracts had been made, and while the parties were operating under them, the State created the Railroad Commission, and through its agency, at the instance of the Sutter-Butte Canal Company, undertook to exercise its reserved power and to fix rates for the water service which would produce for the water company a larger income than it was receiving under the contracts.

The Commission by its decision increased the acreage rates. Upon no consideration of any difference in the character of the service—indeed, no such difference was shown nor does it exist—the Commission by the same

decision classified the consumers of water into the "contract holding" class and the "non-contract holding" class. In the first it included all those who had entered into the contracts, and, in the second, a large number of consumers to whom the water company had been serving or desired to serve water when and as they might require it for irrigation. The acreage rates fixed by the Commission were substantially the same for members of the two classes for each of several designated crops, but in their operation they provided several preferences for the non-contract holding consumers and were highly discriminatory against the contract holders.

The Commission decided that it had power to change the terms of the contracts by increasing the acreage rates, and to hold the consumers to all other terms of the contracts. The result is that:

1. Those in the non-contract class are permitted to designate each year the acreage of their respective lands which they desire to irrigate, while those in the contract class are denied this privilege.

2. Those in the non-contract class pay the acreage rates only upon the number of acres respectively designated by them annually, while those in the contract class are required to pay the acreage rates upon every acre of land owned by them whether irrigable, or irrigated, or not.

3. Those in the non-contract class are liable for the annual charges just as consumers of gas and electricity are liable for their utility bills for service rendered. If the bills are not paid, water may be shut off, and the consumer may be sued in the ordinary law courts, where

he may make any proper defense against the claim of debt. On the other hand those in the contract class have all their lands burdened with a lien for the increased acreage rates applied to all the land owned by them respectively whether any water is served to them or not, and regardless of how many acres may be irrigated.

The argument is made under six heads, as follows:

1. The basic error, under which is shown the failure of the California Court to distinguish between the function of fixing as a matter of law reasonable and nondiscriminatory rates for public utility service, and the lack of power in the State to change one of the terms of the contracts and thus relieve one of the parties from serving water at a contractual low rate while increasing the contractual burden of the other party which entered into the consideration for a low rate.

2. The contracts involved, under which is shown that the contracts were valid when made, and that when the State exercised its power to fix rates by law, the contracts yielded to the superior power, and none of their provisions concerning the use of water or the rates to be paid therefor, nor the provisions dependent upon or constituting a part of the consideration for those provisions, thereafter had any effective force.

3. The impairment of the obligations of the contracts, under which is shown that the contracts were within the protection of Section 10 of Article I of the Constitution of the United States, and that it was violated by the change made in them.

4. The taking of property without due process of law, under which is shown the violation of that clause of the Fourteenth Amendment of the Federal Constitution, by the imposition of the non-contractual and extra-legal liens.

5. The denial of the equal protection of the laws, under which is shown the violation of that clause of the Fourteenth Amendment, in the arbitrary and groundless classification which results in gross discrimination against those in the so-called contract holding class.

6. The power of the Supreme Court of California, under which it is shown that under Section VI of the Constitution of the United States it had not, as it determined, been denuded of power to enforce the guaranties of the Federal Constitution.

Argument.

This case comes here by writ of error to review a judgment of the Supreme Court of the State of California affirming a decision of the Railroad Commission of that State in a proceeding instituted by Sutter-Butte Canal Company, a public utility corporation, supplying water charged with a public use, to the general public for irrigation, to procure an order increasing rates for such water service.

C. W. Thresher and W. G. Coppernoll, individual plaintiffs in error, were joined in the suit by various associations representing other individuals, who like the individual plaintiffs in error are consumers of water served by the Sutter-Butte Canal Company.

I.

THE BASIS OF ALL ERRORS.

The Basis of All the Errors in This Case Was the Failure of the California Court to Distinguish Between "Moneys Becoming Due Under the Contract" and "Moneys Becoming Due Under the Order of the Railroad Commission," That Is, "Becoming Due as a Matter of Law"; and, Between the Power to Fix Public Utility Rates and the Lack of Power to Change the Contracts.

The contracts contain mutual and correlative obligations other than those dealing directly with the service of water and the annual compensation to be paid by the consumer therefor to the water company. Each contract related to all the land owned by the particular consumer in the single body to which the contract in terms was declared to be appurtenant. For instance, Mr. Thresher, one of the individual plaintiffs in error, owns 625 acres of land to which the water company by the contract, made in 1904, undertook to deliver one cubic foot per second for each 160 acres, for the annual contractual rate of $1.50 an acre for the 625 acres for eleven years after the completion of the main canal system, and thereafter $1.00 an acre for the 625 acres. (R. 71.)

Under the terms of the contract, therefore, there became due for eleven years for water service $927.50 annually. After the expiration of the eleven years *there became due under the contract $625 annually.* (R. 71.) The contract provided that:

> "All sums * * * *to become due under this contract* * * * shall be and become a lien upon the lands herein described, and may be foreclosed as any other lien including costs and charges and all necessary and reasonable expenses, and attorney's fees connected therewith." (R. 42.)

In other words, Mr. Thresher agreed that there should be imposed upon his 625 acres of land for eleven years a lien to secure the payment annually of $927.50, and thereafter a lien to secure the annual payment of $625 to the water company whether he received, or the water company delivered, any water or not, because those two annual amounts would *become due under the contract.* The consideration for this obligation was the counter-obligation of the water company to deliver to his land at the low rate agreed upon, the stipulated quantity of water in the event he should call for it for use on his lands. Those agreed sums were the only sums which ever did or which ever could *become due under the contract.*

When the State fixed rates for water service in the exercise of its admitted power to regulate charges of public utilities, the decision by which those rates were fixed was in effect a law passed by the State and the rates so fixed did not *become due under the contract* but did *become due by virtue of that law.*

Home, etc. Co. v. Los Angeles, 227 U. S. 278;
Arkadelphia Co. v. St. Louis Co., 249 U. S. 134;
Atlantic Coast Line v. Goldsboro, 232 U. S. 548.

It may be argued that the decision of the Railroad Commission is to be construed as a law only for the purpose of testing the jurisdiction of this Court. Even if a contention that a law is sometimes a law and at other times is not a law could be upheld, still the annual charges to become due *under the decision* are certainly not annual charges to become due *under the contract.*

The Supreme Court of California in its opinion said that "it is true that sums which became due for water

service became a lien upon the lands and might be foreclosed as such, *but this provision was a part of a contract freely entered into.*" (R. 140.) From what has been said, it is clear that this holding was erroneous in the omission from the statement of the Court the words "under the contract," which limited the contractual right to a lien to sums which *were to become due under the contract.* There is no word in the record to support the statement that the consumers entered into any contract for a lien upon their lands for an uncertain amount which might become due under any one of many variant decisions of the Commission. Such a construction placed upon the contract would change a lien for a fixed and modest amount which the consumer was by the contract obligated to pay whether he wanted or received water or not, to a lien for any amount which the Commission might determine he should pay to the public utility even though the consumer might not want or receive any water. In one case, he agreed to the lien because of his ability and willingness to pay the small amount he promised to pay. In the other, he agreed to no lien for an amount which might be beyond his ability to pay, and of which, if arbitrarily imposed, he preserved his right not to pay because of the unlawful exaction.

The California Court erred because it failed to recognize the difference between setting aside the contract and remaking a contract to which no one ever agreed, and also failed to distinguish between the lack of power to change the terms of the contract and its admitted power to fix public utility rates bearing equally on all persons similarly situated as to service, leaving it to

individuals to accept service or not in accordance with their respective requirements.

II.

THE CONTRACTS INVOLVED.

The Contracts When Made Were Valid and Were Not Subject to Change. They Were Subject to the Reserved Power of the State to Take Over the Entire Control of the Use of Water and Incidentally to Fix the Rates to be Charged for Water Served Under the Control of the State of the Public Use.

In its opinion the California Court stated that the duty of the canal company to furnish the water which it agreed to furnish remains a continuing and enforceable obligation excusable only upon the happening of some such contingency as was pointed out in *Butte County Water Users Association v. Railroad Commission.* (R. 141.)

The Court seems to have contradicted that statement, when it also said that in the case of *Butte County Water Users Association v. The Railroad Commission* and other decisions, it was determined that the "contracts such as the one under consideration (and in the latter case the identical contracts) give neither party any right which is not subject to the power of the State, as the latter has unquestionable power to regulate and control public uses irrespective of the contractual relations of private parties. This knowledge was imputable to petitioners before they entered into their contracts." (R. 140.)

The superior right of the State to control the public use rests in a provision of the Constitution of California, adopted in 1879, which was that:

"the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribu-

tion, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law * * *."

Constitution of California, Art. XIV, Sec. 1, p. 766.

That provision of the Constitution, said the Supreme Court of California, in 1900, before the contracts in suit were made,

" * * * left to the legislature the power and discretion of regulating the sale of water outside of municipalities if the time should come when, in its wisdom, it thought such regulation was called for—or to allow the people to continue to freely contract on the subject * * *."

Fresno Canal, etc. Co. v. Park, 129 Cal. 437-445.

In 1908, before the Railroad Commission was created, the same Court said:

"Permanent rights to the use of water for irrigation may still be obtained by contract, * * * subject only to the condition that the State may, if it chooses to do so, regulate and control the use."

Stanislaus W. Co. v. Bachman, 152 Cal. 716-730.

In 1909, that Court said:

" * * * a public service water company which is appropriating water under the constitution of 1879, for the purposes of rental, distribution, and sale, *cannot confer upon a consumer any preferential right to the use of any part of its water.* * * * In the late case of *Hildreth v. Montecito Creek Water Co.* (139 Cal. 22), it was said by Mr. Justice Shaw, speaking for the court in Bank, in defining the public use declared by the constitution: 'In the case of a public use, the beneficiaries do not possess rights to the waters which are, in the ordinary sense, private property. A public use "must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates." (Cases.) The right of an

individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not'."

Leavitt v. Lassen Irrigation Co., 157 Cal. 82-89-90.

Between 1910 and 1916 the Constitution was amended creating the Railroad Commission, and the Water Company Act of 1913 and the Public Utilities Act were adopted. The first of those acts has no application to the matters in controversy. None of those enactments modified the law in regard to the State's power to regulate and control the public use of water. In 1916, there were two cases, which below were relied upon by the defendants in error. On analysis, it appears that neither modified the rules laid down in *Leavitt v. Lassen Irrigation Co.*

The first case had nothing to do with any exercise of the State's power to regulate and control the public use of waters. In that case the Southern Pacific Company sued the Spring Valley Water Company, in equity, to enjoin it from depriving the railroad of water which the water company had contracted to give it in consideration of the grant of certain rights of way. The railroad stood upon its contract. The water company relied upon three propositions, of which two have not the most remote bearing on this case. The other ground relied on by the water company was that the contract to furnish water perpetually was opposed to public policy and void. The Court, speaking by Mr. Justice Shaw, said:

"There is nothing inherently wrong in such a contract to give water service upon payment in advance.

No regulation or rule of any public authority impowered to control or regulate public water service in Alameda County had or has forbidden it. (Italics are ours.) * * * Where the rates for water devoted to public use have not been fixed by public authority, the person in charge of the use and the consumer may freely contract regarding the price of service and the manner of payment * * *.

"It is true as said in the Leavitt case, that the person in charge of the public use is a trustee in charge of a public trust, * * *. And so he cannot convey it away absolutely to private use, or *contract for a preference to one consumer to the detriment of others in the public use.* (Italics are ours.) Any contract purporting to give such preference in the public use, or to transfer a part of the dedicated public supply to private use, is subject to revision by competent public authority, to the end that the public service shall not be unjustly discriminatory, or unreasonable, and that the private use shall not interfere with the public use, and such contracts may, by such authority, be reformed accordingly, to make them conform to the public interest. (Cases.) In the case first cited it is said that the power to fix rates and regulate public service or water devoted to public use 'carries with it jurisdiction to determine the reasonableness of charges, irrespective of prior contracts; to that extent such contracts may be reformed.' But until such public authority has intervened and modified such prior contract, it will be recognized as valid, * * *."

Southern Pacific Co. v. Spring Valley W. Co., 173 Cal. 291-297.

The statement in that case that contracts such as this are subject to revision was made in passing. No Federal question was raised in the case as to the power of the State to revise the contract. The power of the State is not to change the contract in violation of Section 10 of Article I of the Constitution of the United States but to

disregard the contract in fixing rates when the State assumes control of the public use.

In the second case in 1916, the Court drew the distinction between moneys to become due under the contract and rates to become due by law. The contracts then under consideration provided for the furnishing of water to lands sold by the Palermo Company and the contracts in terms provided that the water was to be supplied "at such rates as may be fixed by law in the district in which said lands are situated."

The Supreme Court commented on this provision, saying:

> "In the very inception of the right, therefore, it appears that the parties contemplated that the rates to be charged should be those fixed by public authority. The fixing of rates by public authority in itself implies that the service is to be that of a public utility. The right to regulate the price of service exists only when such service is one affected by a public interest."
>
> *Palermo L. & W. Co. v. Railroad Commission,* 173 Cal. 380-384.

In 1917, in a case in which the then petitioner sought to set aside a decision of the Railroad Commission fixing rates, upon a contention that it had contractual rights to receive water at different rates, the Supreme Court of California, speaking by Mr. Chief Justice Angellotti, with whom concurred all the other Justices, including Mr. Justice Shaw, who later became Chief Justice of that Court, and Mr. Justice Lawlor, who is still a member of the Court, said:

> "The power to prescribe the rates at which water devoted to public use shall be furnished is, of course, a necessary incident of the power of regulation possessed

by the State, for the purpose, among others, of preventing discrimination between persons entitled to the benefit of the use, and insuring to such persons the furnishing of the water to which they may be entitled upon fair and reasonable terms. It is a continuing power that may be exercised at any time, regardless of any attempted contract existing between the public utility and a consumer. * * * No preferential right as to rates to be paid for the use of any part of the water devoted to public use can be so created by contract between the parties as to be immune from such regulation by the State. The effect of the provisions of our own constitution in this regard is so exhaustively and clearly stated in Leavitt v. Lassen Irr. Co., 157 Cal. 82, where our earlier decisions are reviewed, as to render further citation or discussion unnecessary.

* * * * * * *

"This case cannot be distinguished on the facts from Leavitt v. Lassen Irr. Co."

Limoniera v. Railroad Commission, 174 Cal. 232-238-241.

A marked difference exists between that case and this. There, the petitioner contended that it had a right to receive water at the old contractual rates. In the present case, the plaintiffs in error make no such claim, but they maintain that because the State of California took over the regulation and control of the public use with the incidental power to fix rates, none of the old contractual obligations concerning service of water or the charge therefor have any further potency. On the other hand, that both the service and the charge therefor must be fixed as a matter of law by a decision of the Commission acting within its powers.

The plaintiffs in error deny that it is within the power of the Railroad Commission to hold them bound to pay

the rate on acreage not served with water or to impress a lien upon their lands for water rates by virtue of the old contracts and, at the same time loose the water company from the old contract obligation to serve the water at the old contractual rate.

In a suit for specific performance, Mr. Chief Justice Marshall made a statement as clearly applicable to this case as it was to the suit in equity then before this Court:

> "No Court could allow one party to hold the other bound, while the obligation was not reciprocal; or to hold himself prepared to avail himself of all favorable contingencies, without being affected by those which were unfavorable."

Brashier v. Gratz, 6 Wheat. 528-529.

In the opinion under review, reference is made to a case decided in 1921, which the California Court said involved contracts identical with those in suit. In the present case, it was contended by both of the defendants in error that the Supreme Court of California had there decided that the contract holders had vested rights in fixed quantities of water. That was the very thing which that Court has always refused to decide, and its refusal in that case was couched in the following language:

> "It is a contention directly contrary to the principle upon which Leavitt v. Lassen Irr. Dist., 157 Cal. 82, was decided, and wholly opposed to the fundamental principle that a public utility must hold itself out as ready to serve and must serve the public or its portion of the public without discrimination or preference other than such as corresponds to differences in the value or cost of the service rendered."

Butte County W. U. Ass'n. v. R. R. Commission, 185 Cal. 218-224.

In 1921, the Supreme Court of California clearly differentiated between the proper function of fixing rates for utility service as a matter of law, and improper interference with prior contractual obligations. In that case, the petitioner Law was the holder of a contract whereby the predecessor of the Great Western Power Company undertook for a period of twenty years after 1910, at rates agreed upon, to furnish steam and electricity for the purpose of supplying heat, power, and illumination of a building in San Francisco owned by the petitioner. In addition to the prices agreed to be paid for the service rendered, the purveyor of steam and electricity was granted the right to use free of charge parts of the premises belonging to the petitioner. In 1920, the Railroad Commission made an order fixing schedules of rates for steam heating service, and prohibited deviations from the schedule under existing contracts providing different rates. The Supreme Court of California, properly upholding the power of the State to fix utility rates, said:

> "There is no longer any question as to the power of a state to fix rates for a public utility service which will supersede rates for such service previously fixed by private contract between the consumer and the company" (p. 739) * * * "If the service contracted for was devoted to public use, the contract for the service was subject to the exercise of the police power and, the state having elected to confer upon the Commission the power to prescribe uniform rates for the service, petitioner cannot complain if the exercise of this power results in the practical annulment of his private contract fixing compensation for a public service. * * *."
>
> *Law v. R. R. Commission,* 184 Cal. 737-740.

So far, the rule then announced by the Supreme Court of California is that on which the present plaintiffs in

error rely. After disposing of two contentions which have no bearing upon the present case, the Court in that case continued:

> "There remains the claim of petitioner that, if the Great Western Power Company is to retain its right given by the contract to use agencies and appliances belonging to him, the order will operate to deprive plaintiff of the use of his property without compensation and, by compelling him, in effect, to pay a higher rate than other consumers, created the discrimination it purported to abolish. *If the order attempted to change the rate paid by petitioner and, at the same time, give the power company the right to continue to use the agencies and appliances of petitioner under the contract, then it would, indeed, exceed the jurisdiction of the Commission by depriving petitioner of his property without compensation and due process of law.*"
>
> *Law v. Railroad Commission*, 184 Cal. 737-741.

In the present case the decision changed the rate paid by the contract holder, and, at the same time gave the water company the right to collect the new rate upon every acre of the contract holder's land and a lien on all the land as security whether any water was served or not. As thus paraphrased, the conclusion reached in the *Law* case applies. The decision was beyond the jurisdiction of the Commission.

From all the prior decisions of the Supreme Court of California, it is clear that the contracts in question were valid when made, that they bound the parties until the State undertook to control the public use of the appropriated water, that then, and then only, the State had the power to fix rates as a matter of law, that when that power was exerted the contracts were compelled to yield, and thereafter the rights and obligations concerning service and rates, both of the public utility and all mem-

bers of the general public served by it were fixed as a matter of law and not by the contracts.

That the contracts must yield to the governmental power to fix rates, was all that has ever been decided by this Court. The principle is well illustrated in a case involving the exercise of the power reserved in the Congress to regulate interstate traffic. Until that sovereign power was exercised carriers might and did enter into lawful contracts with individuals concerning interstate traffic. Immediately the Federal Government assumed to act under its continuing power every such contract yielded as to future dealings between the parties. Thereafter, their dealings were controlled, not by prior contracts, but by the provision of the law. The case was one where the New York Central Railway contracted with one Gray to prepare for it a map of its lines as an exhibit at the Columbia International Exposition; the agreed price for the map was $750, of which $150 was paid in cash and the balance was to be paid in transportation to be given to Gray when and as he required it between New York and his home in Pennsylvania. Before the transportation account had been satisfied the Federal Government under the Hepburn Act declared it unlawful for any interstate carrier to furnish transportation for any part of an interstate journey in payment for services or for any other consideration except a regular fare paid in money. The railroad company declined to continue to furnish transportation under the old contract and Gray sued. The case came to this Court, which decided that the Railroad Company acted strictly in accordance with the law in refusing to furnish transportation in performance of the prior contract, but the Court said:

"It by no means follows that it" (the Railroad Company) "could refuse to make full compensation in money for the unpaid purchase price of the map."

N. Y. C. & H. R. R. Co. v. Gray, 239 U. S. 583.

In the present case the contracts must yield to the superior power of the State to fix both the conditions and quantity of the public use of water and the rates to be charged therefor. It by no means follows that the contracts are invalidated, rights which have grown up under them will be protected by the courts in proper proceedings, and if either party is entitled to compensation a court will make the adjudication, but the Railroad Commission is not vested with power to make new contracts for the parties, nor to adjudge upon their mutual contractual obligations.

III.

IMPAIRMENT OF THE OBLIGATIONS OF THE CONTRACTS.

As Construed and Applied by the Supreme Court of California, Sections 22 and 23 of Article XII, Adopted by Amendment Respectively in 1911 and 1914, Creating and Enlarging the Powers of the Railroad Commission, and the Public Utilities Act of That State, as Well as the Decision of the Railroad Commission in Question, Are Violative of Section 10 of Article I of the Constitution of the United States In That They Are Laws Impairing the Obligations of the Contracts Involved Here.

The plaintiffs in error do not claim that either Section 22 or 23 of Article XII of the Constitution of California or that any provision of the Public Utilities Act is violative of Section 10 of Article I of the Constitution of the United States. On the other hand, they maintain that those enactments are entirely valid. They do maintain that the interpretation placed upon those sections of the

Constitution of California and upon certain provisions of the Public Utilities Act by the Supreme Court of California was erroneous, and if it shall be sustained, the effect will be to render those sections of that Constitution and of the Public Utilities Act of that State obnoxious to the provisions of Section 10 of Article I of the Constitution of the United States.

It is elementary that where the question before this Court is whether or not the Supreme Court of a State erred in interpreting a statute of that State, the ordinary rule binding Federal Courts to accept the interpretation which State Courts have given to local statutes has no application. Otherwise, the guarantees of the Constitution of the United States would be without force. It would be absurd for any one to contend that in a case involving a Federal question arising under a State statute, an interpretation placed on the statute by the Supreme Court of the State denying the existence of the Federal right would seal the doors of this Court.

> "When questions affected by the interpretation of a State statute or a local rule of property arise in a Federal court, that court has the same authority and duty to decide them as it has to decide any other questions which arise in a cause; * * *." (Cases cited.)
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> *Hines etc. v. Martin,* U. S. Sup. Ct. Adv. Op. (1924-1925) pp. 604-606;
>
> *Louisville etc. R. Co. v. Palmes,* 109 U. S. 244.

In the decision of the Railroad Commission under review both in the Supreme Court of California and here, it was stated:

> "It is well settled in this state that contracts of this sort are subject to revision. *To the extent that the rates for water are changed by the orders of the Rail-*

road Commission these contracts are modified or reformed but not wholly superseded or abrogated. Other provisions of such contracts may remain in full force and effect." (R. 14.) (Italics are ours.)

In the opinion by which the judgment under review was rendered, speaking of the decision of the Railroad Commission, the Supreme Court said:

"It accordingly, by its decision and order, made a general increase in the water rates of the Canal Company, substantially in the form of its previous order, *but with the express ruling that as to the acreage of contract holders to be affected by such increase the provisions of their contracts should remain in full force and effect.*" (R. 137.) (Italics are ours.)

It also said:

"*The Railroad Commission did not attempt to change, limit, modify or abrogate any of the provisions of said contract* * * *. Acting within its unquestionable jurisdiction it did increase the water charges by the adoption of a uniform rate scale which was made applicable to each and every acre owned by the contract holders. Its action in this particular was in strict accord with the system which was agreed upon by the petitioners. * * *" (R. 138.) (Italics are ours.)

In only two California cases other than in the case now under review has there been any suggestion that in the exercise of its police power a State may impair the obligations of contracts by adding new burdens upon one of the parties to the contract, thus giving to the other party new benefits not secured by the contract. In neither case was any Federal question raised, or if raised, it was not brought to this Court for adjudication. In both the prior cases, the statement made in this case by the Supreme Court of California as a matter of law, was unnecessary to the decision.

The first of the two cases involved the question of the right of a railway company to receive water free at its station in return for an easement it had granted to maintain water mains on the company's right of way. It was held that in the absence of rates being fixed by public authority, the contract should control. In passing, the Court said that such contracts were subject to revision by the Railroad Commission.

Southern Pac. Co. v. Spring Valley Water Co., 173 Cal. 291-298.

In the second case, the sole question was whether or not the Lake Hemet Water Company at the time it entered into the contracts then in question was a public utility as to the water which the company had agreed to sell. The Court determined that it was not. In passing, the Court said that if the company at the time of making the contracts had been a public service corporation, the contracts were subject to modification at the instance of the Commission.

Allen v. Railroad Commission, 179 Cal. 68.

Even though the loose and unnecessary statements made in the *Allen* case and in the *Spring Valley Water Company* case should be given the force of adjudications, neither would be controlling in the present case.

"The question we have to consider and decide is, whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State court, whether there is a contract, and whether its obligation is impaired and if the decision of the question as to the existence of the alleged contract requires a construction

of the State constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property."

Louisville etc. R. Co. v. Palmes, 109 U. S. 244-256.

"When it becomes necessary to consider whether a state is depriving, or attempting to deprive, a litigant of property without due process of law, in violation of the 14th Amendment, and the question turns on the existence and terms of an asserted contract, this court determines for itself whether there is a contract and what are its terms. * * * If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the State tribunal as to what are the facts alleged to give rise to the right, or to bar the assertion of it even upon local grounds."

R. R. Comm. Texas v. East. Texas etc. R. R., U. S. Sup. Ct. Adv. Op. (1923-1924) pp. 309-311-312.

Whatever powers are possessed by the Commission flow from the amendment to the California Constitution adopted in 1911, creating the Commission, known as Section 22 of Article XII, the amendment of 1914, further defining those powers, and in terms vesting in the Legislature plenary power to confer further powers on the Commission, notwithstanding any limitation of that Constitution, known as Section 23, of the same article, and, the Public Utilities Act, adopted pursuant to those sections. The pertinent portions of all three are printed in the appendix to this brief. In Section 23 of Article XII the power of the Railroad Commission is expressly limited, under the rule that when one thing is expressed all others are excluded, to fixing *"rates to be charged for commodities furnished, or services rendered by public utilities."*

By attempting to change the contracts, instead of pursuing the admitted power to fix rates the Commission in this case assumed for the benefit of the Canal Company to charge the contract holders for water not furnished and for public utility service not rendered.

There is nothing in any provision of any California law which purports to authorize the Railroad Commission to fix any rates for commodities not furnished or service not rendered by a public utility. Nor is there any enactment which purports to authorize the Railroad Commission to modify or change the terms of any contract.

The Railroad Commission in the present case said that these contracts were subject to modification and that by its order it did change their terms. The Supreme Court of California said that the Railroad Commission did not change any term of the contracts or seek to modify them. It further said that the Railroad Commission had changed the annual rate specified in the contracts for water service but had not changed *any other* provision in the contract. It further stated that the parties to the contract had agreed when they made the contract to such a change. The Supreme Court of California affirmed the decision of the Railroad Commission.

To reach its determination, the Supreme Court of California declared that the Railroad Commission had jurisdiction to change the contracts. Its jurisdiction rests wholly in the two sections of the Constitution to which reference has been made and the Public Utilities Act. If by those enactments the Commission acquired jurisdiction to change the contracts, they are violative of Section 10 of Article I of the Constitution of the United States.

It will no doubt be argued that the Supreme Court of California did not construe those sections of the Constitution and the Public Utilities Act in terms to authorize the Commission to violate Section 10 of Article I of the Constitution of the United States, but that it justified the act of the Commission by construing the contracts themselves, and as so construed concluded that the Commission had power to change the terms because the parties agreed thereto. In the preceding section of this brief, it has been conclusively shown that the parties to the contracts never agreed to any such thing.

It is to be borne in mind that by the judgment under review, the Supreme Court of California has given the force of law to the decision of the Commission. That decision, which was directly attacked in the Supreme Court of California and is attacked here, is itself a law in violation of Section 10 of Article I of the Constitution of the United States and the judgment of the Supreme Court of California affirming the decision of the Commission could not have been rendered without determining the Federal question presented concerning the impairment of the obligations of the contracts.

Atlantic etc. R. Co. v. Goldsboro, 232 U. S. 548-555;
Arkadelphia Co. v. St. Louis Co., 249 U. S. 134-141.

The determination of whether or not acting under authority of the two sections of the California Constitution to which reference has been made and the Public Utilities Act, the Railroad Commission by its decision impaired the obligations of the valid contracts made before

either of those constitutional provisions was adopted, could not be evaded in this case.

Chapman v. Goodnow's Administrator, 123 U. S. 540-548;

Yazoo & Mississippi etc. R. Co. v. Adams, 180 U. S. 1-15;

Chicago Life Insurance Co. v. Needles, 113 U. S. 574.

The Court could not dispose of the Federal claim by construing the contract to bring it in harmony with the decision of the Railroad Commission, or of the Public Utilities Act and Sections 22 and 23 of Article XII of the Constitution of California. Where a state court disposed of the case before it by a construction of the contract, that construction was held by this Court in effect to be the same as if the construction of the contract were in dispute and the point decided upon the ground that the subsequent act did not impair it. This Court said:

"The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in form of expression than in the character of the question involved."

Columbia, etc. Co. v. Columbia, etc. R. L. & P. Co., 172 U. S. 475-487;

McCullough v. Virginia, 172 U. S. 102;

New Orleans, etc. Co. v. Louisiana, etc. Co., 125 U. S. 18;

Bridge Proprietors v. Hoboken Co., 1 Wall., 116.

"Although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that in

real substance and effect, force has been given to the statute complained of our jurisdiction attaches."

Columbia, etc. Co. v. So. Carolina, 261 U. S. 236-245.

It has been shown that there was a contract, that it was valid when made and that it was made subject to the reserved power of the State of California at any time to take over the regulation and control of the water supplied and to fix rates for the commodity thereafter furnished or service thereafter rendered. It has been shown also that the parties did not agree to any change being made in the terms or obligations of the contract.

"A contract having been entered into between the parties, valid at the time, by the laws of the State, it is not competent even in its Legislature to pass an Act impairing its obligation, much less could any decision of its courts have that effect."

Chicago v. Sheldon, 9 Wall. 50.

"The sound and true rule is, that if a contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law."

Gelpecke v. City of Dubuque, 1 Wall. 175.

It is stated in the decision of the Railroad Commission that the plaintiffs in error claim that the fixing of rates different from those specified in the contracts has resulted in the complete abrogation of those contracts in all particulars. (R. 14.) No such contention has ever been made. The plaintiffs in error have not sought to evade any obligations of the contracts binding on them entered into in consideration of the building of the ditches and the bringing of water to their farms. The obligations as-

sumed by them to maintain their own ditches, to give the water company free access to and over their lands, to support the right of the company to take over at any time and assume the operation of the ditches constructed by them so long as the water permitted by the Railroad Commission to be supplied to them continues to be so supplied have not been questioned. The plaintiffs in error maintain and at all times have maintained that the State of California has power to disregard the provisions of the contracts relating to the quantity of water to be served and the rates to be paid for service, but that it has no power to change one term of the contracts and thereby relieve the water company of its contractual obligations and at the same time increase their contractual burdens. They maintain that while the State may fix rates for public utility water service, it cannot make new contracts for them.

> "The contract being, then, complete and operative, the Legislature cannot, by a subsequent act, impair its obligation by requiring the performance of other conditions, not required by the law of the contract itself. * * * The power to impose conditions, after the contract is once complete and perfect, is nothing but the power to impair its obligation, and this the Constitution has prohibited."
>
> *Robinson v. Magee,* 9 Cal. 81-84-85.

In the present case, the water consumers among other things agreed that a fixed annual sum determined by the contract and *becoming due under the contract* should be secured by a lien upon their respective farms. By the decision of the Railroad Commission, affirmed by the Supreme Court of California, their farms have been subjected to a lien for an entirely different and increased

amount of money not becoming due under the contract and for a public utility service not rendered. What is this but an imposition of conditions after the contract is once complete and perfect? Is it anything but the exercise of a colorable power to impair the obligation of the contract prohibited by the Constitution?

IV.

DUE PROCESS OF LAW.

The Individual Plaintiffs in Error and All Others Similarly Situated Are Deprived of Their Property Without Due Process of Law by the Imposition of Liens Upon Their Lands to Which They Never Agreed, Without Any Warrant of Law, and in Violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

There is nothing in Section 22 or Section 23 of Article XII of the Constitution of California or in the Public Utilities Act from which all powers of the Railroad Commission of that State flow which permits the Commission to impose any lien upon any property of any person. If a customer of a public utility company, whether for service of gas, electricity, heat, or water, fails to pay his bills for the service actually rendered, the utility company under rules approved by the Railroad Commission may discontinue service and it may sue in the ordinary course of law for the debt. It may acquire a lien on the lands of the consumer by attachment in such a suit, or by judgment therein. It might acquire a lien upon the lands of the consumer by an agreement between the utility company and the consumer. In other words, if extended credit were given by a utility company to one of its consumers, the utility company might agree to forego its

right to discontinue service or to sue for the debt in consideration of the consumer executing a mortgage for the accrued debt, so long as it did not thereby violate the provisions of the Public Utilities Act concerning preferential treatment of similarly situated consumers.

Prior to the exercise of the State's reserved power to regulate and control the use of water and to fix rates for the commodity furnished or service rendered, the water purveyor and the consumer might agree, and in the present case they did agree in the contracts in question, that the consumer's lands should be subject to a lien for a fixed sum annually to *become due under the contract.* They never have agreed to any other lien being imposed upon their lands and the Sutter-Butte Canal Company has not acquired a lien in the ordinary course of law by attachment or judgment.

The contract for the specific lien for a specific amount was made subject to the right of the State at a future date to take over the entire regulation and control of the use of water and to fix uniform rates for such use. There was no power reserved in the State under any statute or provision of the State Constitution to impress a lien upon the property of the water consumer in the exercise of the power to regulate water service and to fix rates for such public utility service.

Relating to the specific contractual lien to secure the payment of a specific sum of money becoming due under the terms of the contract, there was a statutory provision in force at the time the contracts were made which as fully entered into each contract as did the provisions of Section 1 of Article XIV of the Constitution of California concerning the reserved power of the State to regulate

and control the use of the water. The statute in question was adopted in 1872 as a part of the Civil Code of California and it has never been amended. It is as follows:

> "The existence of a lien upon property does not of itself entitle the person in whose favor it exists to a lien upon the same property for the performance of any other obligation than that which the lien originally secured."
>
> *Cal. Civil Code*, Sec. 2891.

No citation of authority is necessary to support the rule that the right of the owner to dispose of property is just as much a property right as his right to possess and use the property. No lengthy argument is necessary to establish the fact, so familiar that this Court may well take judicial knowledge of it, that a lien of any nature upon real property interferes with the power of the owner to dispose of it, and to the extent of the lien diminishes the value of the property. The imposition of a lien without authority of law to that extent is a taking of property within the meaning of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Notwithstanding the statement in the opinion of the Supreme Court of California to the effect that the parties to the contract had agreed upon the imposition of this lien, it has been clearly shown that they agreed to no such thing. The lien adjudged by the Supreme Court of California was imposed notwithstanding the terms of the contract, contrary to the provisions of Section 2891 of the Civil Code, and in the exercise of an authority claimed under Sections 22 and 23 of Article XII of the Constitution of California and the Public Utilities Act. The im-

position of the lien constituted a taking by the State, not as in the case of eminent domain, upon a fair consideration and for the benefit of the State, but without compensation and solely for the benefit of the Sutter-Butte Canal Co.

> "The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."
>
> *Missouri Pacific Ry. v. Nebraska*, 164 U. S. 403-417.

It may be argued that the lien imposed is not a serious infraction of the property rights of the owners of the land. The imposition of this non-contractual, extra-legal lien does not present a case where the rule *de minimus* can be made to apply. Even though the acreage rates fixed as a matter of law had not been increased over the contract rate, since under the decision, they would have been applied only to the acreage of lands of non-contract holders which they might desire to irrigate, and would have applied to all the lands owned by the contract holders whether irrigated or not, the imposition of the lien by the regulatory body would have been beyond its power. Much more so was the action in this case where the statutory rates were increased. No one for a moment would contend that under any existing law the Commission could impose a lien on the lands of the non-contract consumers.

The judgment under review, while it stands has established, in opposition to the provisions of the Federal Constitution, a rule of law that rates for public utility service, by the decision of the Railroad Commission, may be secured by a lien imposed by that agency of the State

of California, acting in a non-judicial capacity, without statutory authority, and without direct notice to the owner of land sought to be impressed with such a lien.

In the opinion of the Supreme Court of California, it is said that:

> "It is true that any sums which became due for water service became a lien upon the lands and might be foreclosed as such." (R. 140.)

This determination in the suit commenced by the individual plaintiffs in error, if it be permitted to stand becomes as to them *res judicata*. The Court further said:

> "A decision on the question of liens, as well as other questions of a purely legal character, was reserved by the Railroad Commission for adjudication by the courts." (R. 138.)

That adjudication was made in the judgment under review and under the circumstances in this case it is submitted that it amounts to a taking without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be 'Obsta Principiis'."
>
> *Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746-752.

V.

DENIAL OF EQUAL PROTECTION OF THE LAWS.

The Classification of Consumers As Contract Holders and Non-contract Holders Was Arbitrary, Resting on no Reasonable Basis, Nor Upon Any Consideration of Service Rendered; Under it the Individual Plaintiffs in Error and Others Similarly Situated Were Burdened With Charges Greatly In Excess of the Charges Made to Other Consumers of Water Operating Under the Same Conditions of Service; They Have Been and Are Required to Pay For Water Not Served to Them For Their Lands, and Their Lands Are Impressed With a Lien For Statutory Charges While the Lands of other Consumers Are Free From Such Liens. For Each of These Reasons, the Individual Plaintiffs in Error and Others Similarly Situated Have Been Denied the Equal Protection of the Laws.

In the opinion of the Supreme Court, upon which the first judgment was entered in this case, annulling the decision of the Railroad Commission, it was said that:

> "It must be admitted by the petitioners herein as a necessary corrollary to their concession to the effect that the Canal Company was at all times prior to and during the existence of their contracts a public utility, that the full authority invested in the state by the Constitution and by it reposed in the Railroad Commission to regulate rates, *carried with it the power to change said contracts in so far as the proper exercise of the jurisdiction of the rate-making body might require such change.*" (R. 84-85.)

The plaintiffs in error have never admitted expressly or by implication that the State of California ever had power to change the contracts. They maintain that the State has power to fix rates for water incidental to its exercise of its admitted power to regulate and control the use; that when the State undertook to exercise its control and incidentally to fix rates, upon two subjects, namely, the determination of the amount of water to be delivered to

the consumer and the price to be paid therefor, became matters of law and that the legal regulations took the place of any prior contractual obligations. They deny that the State under the guise of fixing public utility rates had power to change existing contracts or to make new contracts to which they had not agreed.

Continuing in its first opinion, the Court said:

"The Railroad Commission by its orders made in 1918 and 1922, regulating generally the rates of the Canal Company as to its customers, has undertaken to keep alive the provisions in the contracts of these petitioners which provide that their water rates shall be calculated upon the areas respectively of their land, as described in said contracts, regardless of the acreage thereof, actually subjected to irrigation from year to year. As to the non-contract users of said water, the rates provided for in each of said orders is to be calculated upon the acreage of their respective holdings of land actually subjected to irrigation during each year. *The effect of these orders is not only to continue in being whatever discriminations had arisen between the contract and non-contract users of the water of said Canal Company, but also to increase the ratio of these discriminations with the additional increase in rates effected by said later order.*" (R. 85.)

After a review of earlier decisions of the Supreme Court of California, the Court in that opinion said:

"*The effect of these decisions is not only to deny to the public utility the right in contracts with certain of its consumers to create preferential discriminations in water rates, but is also to place a like limitation upon the powers of the rate-regulating agency of the state to either create or continue such preferences and discriminations between the consumers of the water of a public utility, equally situated, in so far as the service of water is concerned.* These two propositions are the necessary complements of each other. What the public utility may not do in the way of creating preferential rates through contracts with favored consumers the rate-

regulating body may neither countenance, create or continue by its orders in cases wherein its jurisdiction has been invoked or is attempted to be exercised in any general regulation of the rates of a public utility. Has this been done in the instant case? We are of the opinion that it has, and that the Railroad Commission, to the extent that it has been shown to have done so, has acted in violation of its duty and in excess of its powers. *The order of the Railroad Commission made on March 25, 1918, though not expressly so stating, may be fairly interpreted as intending that the clause in the contract of the contract holders of the Canal Company, providing that the rates to be paid by them should be calculated upon the total acreage of their holdings, should remain in full force and effect and that their water rates as increased by said order should be thus calculated, regardless of the amount of their acreage irrigated or irrigable in any particular year; while as to non-contract consumers of water as to said Canal Company, the said order of the Commission provided for a rate to be paid by them based upon the amount of their acreage actually irrigated in any particular year.*" (R. 86-87.)

Again,

"*In so far, therefore, as the Railroad Commission in its order of April 26, 1922, attempted to continue in force such discrimination, it was clearly acting in violation of the principle which forbids discrimination in rates on the part of public utilities serving this commodity to their users.*" (R. 88.)

Again,

"*We are satisfied that the orders of the Commission which thus perpetuated a discrimination between the contract and non-contract customers of this public utility, which had no basis in any actual difference in the status or rights of these two classes of consumers, is violative of the fundamental principle underlying state control of this form of such use.*" (R. 89.) (All the foregoing italics are ours.)

Again,

"The respondents herein, however, contend that since the petitioners herein did not seek to review or otherwise question the validity of said earlier order, but submitted to the payment of the rates fixed therein, they cannot now be heard to question the method which the Commission adopted in fixing said rates when sought to be reapplied by the Commission through the form of its later order assailed herein. It suffices to state that it does not adequately appear that the petitioners herein were so injuriously affected by the imposition and collection of the rates fixed in said earlier order as to have justified them in assailing it simply because a wrong principle had been adopted in the fixation of its rates. They cannot, therefore, be held to be concluded from their assault upon a later order in which the like wrong principle in rate fixing had been persisted in by the Commission to the extent of perpetuating a discrimination in rates which it is obvious would be increasingly unjust." (R. 89-90.)

The entire opinion on which the first judgment in this case was rendered by the Supreme Court of California (R. 81-90) is referred to the consideration of this Court, not as an authority, because the judgment entered upon it was vacated by the order of the Court, but as expressing the views of men learned in the law upon the very matter now under discussion. It was signed by then Mr. Chief Justice Shaw, than whom no lawyer who has ever graced the bench of the Supreme Court of California had given greater study to the water problems and the development of the laws affecting the use of waters in that State, nor to the development of the controlled public utilities through administrative commissions. It was concurred in by Mr. Justice Lawlor, Mr. Justice Lennon and Mr. Justice Waste, all of whom are still members of that Court, and by Mr. Justice Wilbur, who succeeded Mr.

Chief Justice Shaw as Chief Justice. Between the rendition of that opinion on which the first judgment was entered and the granting of the petition for rehearing, Chief Justice Shaw retired and was succeeded by Mr. Justice Wilbur, and Mr. Justice Kerrigan and Mr. Justice Seawell became members of the Court.

The second opinion now under review was concurred in by all the justices who were then members of the Court. It was there said:

> "The sole question is whether or not these rates should be applied to the full acreage covered by the contracts or only to the acreage actually irrigated, assuming the contract holder does not desire to irrigate all the land covered by his contract." (R. 135.)

There were a number of other and very vital questions, but even if this statement could be accepted upon the record in this case, the determination of that "sole question" was so erroneous as to require the reversal of the judgment.

The California Court, basing its decision on quotations from Section 23 of Article XII of the Constitution of California, and Sections 67 and 17 of the Public Utilities Act, determined it was without power to correct or annul the decision of the Commission on the question of discrimination and classification. (R. 139.) In the next section of this brief the error of that determination will be shown. For the present purpose let it be assumed that the Court was vested with larger powers than it claimed. It said:

> "But if we were vested with jurisdiction to correct or annul the decision it is by no means certain that we would do so upon the record presented and showing made. That there is a logical and natural ground for

the classification made by the Railroad Commission seems convincing." (R. 139-140.)

The Court then in the opinion discussed some of the matters which had been discussed in the original opinion of the Court, and reached the conclusion that, notwithstanding the California decisions discussed in the original opinion, holding there can be no continuously binding contract requiring the water company to deliver a fixed quantity of water, in this case there is such a contract.

The Court then said:

"The Commission further found from the record before it that a compliance with petitioners' request to relieve a large acreage from water-rate payments contrary to their agreements would have reduced the revenues of the Canal Company to a dangerous if not ruinous point and probably would have seriously crippled if not defeated plans for present and future developments that were essential to the welfare of all concerned." (R. 140-141.)

With the utmost deference to the Supreme Court of California, it must be pointed out that a most diligent examination of the record has failed to disclose any such finding. Even if such a finding had been made or was implied, it would seem unnecessary to devote lengthy argument to support both of the following propositions of law:

1. It is within the power of the Railroad Commission to fix reasonable rates, bearing uniformly upon consumers similarly situated, for water service of a public utility, to prevent the failure of a utility, if it be properly and economically managed.

2. The mere fact that a public utility corporation cannot make money without unjust and unlawful exactions

does not warrant a rate-fixing body to violate the Constitution of the United States, nor to require some consumers of water to pay for water not used, while permitting others to pay only for water used by them.

It is suggested in the opinion on which final judgment was entered that if the contract holders had desired to irrigate the entire acreage held by them respectively each year, the objection based on unlawful discrimination would be removed. (R. 138.) It would seem that this suggestion begs the question. Immediately after that suggestion, it was said in the opinion:

> "If, indeed, the number of acres which the consumer should choose to irrigate rather than the number upon which he contracted to pay a water rate is the criterion by which unlawful discrimination is to be determined, then the failure or refusal of a non-contract holder to irrigate in any one year a single acre in the total acreage designated in his annual application would bring about the very result the petitioners complain of. By such a rule one would be excused from performing what he agrees to do and may do that which it pleases him to do, a basis too shifting to predicate unlawful discrimination upon." (R. 138.)

Analysis of that statement shows its inapplicability to either the facts or the law of this case:

1. The plaintiffs in error have not asked to be relieved of any terms of the contracts. The public utility sought to be and was relieved of its obligation to serve water to the contract holders at the contractual rate. The contract holders recognize the power of the State so to loose the Sutter-Butte Canal Company from the contracts under the reserved power to regulate and control the use of water and incidentally to fix rates for that regulated use. The contract holders never agreed to take

or to pay for a single gallon of water, and the Sutter-Butte Canal Company could not bind itself nor was it bound by the contracts to supply to any consumer a fixed quantity of water at a fixed price after the State exerted its reserved power. The contract holders cannot be bound by the contracts to pay for water not served while the water company is no longer bound by them to serve at the contract rates.

2. The contract holders have not suggested either that one of them or one of the non-contract holders should not be bound to pay the rate for the annual service for the number of acres annually designated. They maintain that it is discriminatory against them to give the privilege of such designation to non-contract holders and to withhold it from the contract holders.

3. There is nothing shocking in the suggestion that none of the consumers should pay for water not served. Section 23 of Article XII of the Constitution of California, vests power in the Commission to fix utility rates "for commodities furnished, or services rendered." There is nothing to suggest the existence of a power to fix rates for water not furnished or service not rendered. The California Court said that the question of meterage rates fixed by the Commission has no bearing on this case. (R. 136.) Its relation to the question now under discussion is best shown by quotations from the two decisions of the Commission before this Court:

> "Messrs. Hawley and Loveland both testified that the only method whereby the burden of the expense of this system can be equitably distributed among the consumers is through the establishment of a measured rate schedule whereby each consumer will pay on a quantity basis for the water used. The canal company asks that both a flat rate and measured schedule be estab-

lished leaving it optional with either party whether or not a measuring device be installed. In regard to the advisability of selling water on a measured rate base, I can do no better than quote Commissioner Thelen in Decision No. 4478, In the Matter of the Application of Madera Canal and Irrigation Company for an order authorizing increases in rates charged for water sold for irrigation, Application No. 2381, decided July 23, 1917, as follows:

'While I appreciate that the consumers under this system have long been accustomed to a rate based on the number of acres irrigated and hence naturally cling to it, I am convinced that the acre-foot rate is fundamentally right and should be adopted under this system. The acre-foot rate is right, (1) because it is fundamentally just that each consumer should pay for what he receives, which can be done only by measuring the water; and, (2) because the sale of water by measure creates prudence in the use of water and checks waste, increases the amount of water available to the community and thus helps to develop a large acreage and to increase the general prosperity.

'The canal company is willing to install and operate the necessary measuring devices in connection with an acre-foot rate and asks authority to do so.

'I am satisfied that after a fair test, the consumers under this system will agree that the acre-foot form of rate is more just and constructive than the acre rate heretofore in effect'." (R. 48.)

Again:

"Measuring devices are not at present installed on this system. It should be the privilege of either the consumer or the company to apply the measured rate, which rate must remain in effect until this commission's consent is obtained to the substitution of another form of rate. The cost of the measuring devices must under the decisions of this commission ultimately be borne by the utility. However, where the consumer asks to be served under the measured rate, I believe the canal company should be permitted to require a deposit to cover the cost of installation, which deposit must be

returned to the consumer at the end of one year, either in cash or as a credit on rates." (R. 51.)

Both the last foregoing quotations are from the decision of the Commission rendered in 1918 and made a part of the record in this case. The following two quotations are from the decision of the Commission in this case:

"If the entire system were metered, as has been recommended by the Commission, and all water was paid for on a measured basis, a situation might be presented which would justify the elimination of the annual acreage charge on unirrigated lands. Under present conditions, however, we believe that this charge is justified, and the Commission will not, therefore, prescribe a rate which will supersede this provision of the contract." (R. 14-15.)

Again:

"The advantage and advisability of a measured system of delivery is clearly set out in Decision No. 5226 of this Commission, wherein the rates at present in effect were established." (R. 24.)

If meters had been installed none of the consumers would be bound to pay for any water not furnished.

In the 1918 decision the Commission quoted a statement made in another case, which concisely and correctly states the law in this respect. It was as follows:

"'This Commission has jurisdiction to establish the rates to be paid for water sold by a public utility or the rate to be paid by a customer desiring to establish the relationship of customer and utility (a minimum rate for readiness to serve), but not a rate to be paid by a person who does not desire to purchase water or to be placed in the status of customer of a public utility water company with the right to call on the utility for water whenever he desires to do so.'" (R. 46.)

Under the decision, any man in the non-contract class, owning, as does Mr. Thresher one of the plaintiffs in error in the contract class, 625 acres of land, annually may order and pay for irrigation of 625 acres at the acreage rates; or if 125 acres of his land are non-irrigable, he may order and pay the acreage rates for 500 acres; or, if 400 of the irrigable 500 acres are sown to a crop which requires no irrigation he may annually order and pay the acreage rates for 100 acres; or, finally, if he feels that he cannot afford to pay the rates fixed by the Commission, he may not order water for any land, and, in that event he will pay nothing. There is no continuing lien on his land for any water bill.

Mr. Thresher, being a contract consumer, under the decision, was compelled to pay substantially the same acreage rates on the entire 625 acres every year and the aggregate amount of the bill, solely by virtue of the decision, is imposed as a continuing lien upon his lands whether he desires to or could irrigate the whole 625 acres, or 500 acres, or 100 acres, or no land at all.

The objection of the plaintiffs in error is not based upon the fortuitous fact that under some imaginary circumstances, the contract consumer might or might not pay in any one year the exact amount of the water bill of his similarly situated neighbor, but that he was denied the equal protection of the law which permitted his neighbor to pay for the commodity served and the service rendered which the consumer might order, while the contract consumer is denied the privilege of determining what service he desires; and the contract consumer is burdened by the imposition of a lien upon his land

whether he desires or receives water or not, while the land of his favored neighbor bears no such lien.

There is nothing in the record to show, and there is not any difference in the character of the service rendered the contract and the non-contract consumers.

"The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural."

Nicol v. Ames, 173 U. S., 509-521.

"That principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination."

Western Union Tel. Co. v. Call Publishing Co., 181 U. S. 92-100.

"Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo v. Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power'."

Gulf, etc., Ry. Co. v. Ellis, 165 U. S., 150-159.

Referring to the decision last above cited, this Court in a later case quoted with approval the language of Mr. Justice Brewer in that case, as follows:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of

the equality clause of the Fourteenth Amendment and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Magoun v. Ill. Trust etc., Bank, 170 U. S., 283-294.

VI.

THE SUPREME COURT OF CALIFORNIA WAS NOT POWERLESS.

The Supreme Court of California Interpreted Section 23 of Article XII of the Constitution of California and Sections 67 and 17 of the Public Utilities Act as Denuding It of Jurisdiction to Determine Whether or Not the Order of the Railroad Commission on Reasonableness and Discrimination Was Violative of the Federal Guarantees Claimed by the Plaintiffs in Error.

No act of the State of California prevented or could have prevented the Supreme Court of that State from protecting the privileges and immunities of citizens of the United States guaranteed by the Federal Constitution.

In the opinion upon which final judgment was entered, the Supreme Court of California quoted a portion of Section 23 of Article XII of the Constitution of that State providing, among other things, that the Legislature of that State might confer powers upon the Railroad Commission and that the right of the Legislature in that respect was thereby "*declared to be plenary and to be unlimited by any provision of the Constitution.* * * * " (Italics were those of the California Court.) (R. 139.)

Of course, the Constitution thus referred to was the Constitution of California, not the Constitution of the United States. If the Supreme Court of California assumed that language to refer to the Constitution of the United States, the amendment to the Constitution of

California containing the quoted language was itself unconstitutional. Referring to the italicized language, the Supreme Court of California said:

"Deriving its authority from the above constitutional source the legislature has provided, by Section 67 of the Public Utilities Act, the limit of this court's jurisdiction and power as a reviewing body by the following provision: ' * * * The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. *The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review;* such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on *reasonableness* and *discrimination'.*" (The italics in the quotation were those of the Court.) (R. 139.)

If the quotation had not been italicized in the opinion, or if it had been italicized in a little different way, under well established rules of interpretation, the ambiguity of the language quoted, if, indeed, there be ambiguity, would have been resolved in favor of the jurisdiction of the California Court rather than against it. Suppose the quoted portion of Section 67 of the Public Utilities Act had been italicized as follows:

"The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, *including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States* or of the State of California. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination."

In the section of this brief dealing with the impairment of the obligations of the contracts, reference was made to a case decided by the Supreme Court of California, and to one decided by this Court. In each there was a statement bearing directly upon the power of the California Court.

In the earlier California case it was said:

"This review is held under Section 67 of the Public Utilities Act of 1915. It is plain, and indeed it has in effect been decided, that the declaration in that section that 'findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review, *has to do with the commission's determinations upon questions of fact within its jurisdiction. When the question, ever one of mixed law and fact, goes, as here, to the jurisdiction itself,* when the whole controversy revolves around the inquiry as to whether or not the corporation is a public utility, *to say that the determination of the commission upon this matter is final and conclusive and is not subject to review, is the equivalent of denying to a petitioner a hearing upon a right carefully preserved to him by the language of Section 67 itself—a hearing and a determination of whether the order and decision under review 'violates any right of the petitioner under the Constitution of the United States or of the State of California'.*" (Italics not in the opinion.)

Allen v. Railroad Commission, 179 Cal., 68-74.

In the present case, the question was as to the jurisdiction itself and this portion of the whole controversy revolves around the inquiry as to whether or not the plaintiffs in error were denied the equal protection of laws. To say that the determination of the Commission upon that subject is final and conclusive is the equivalent of denying to them a hearing upon a right carefully preserved to them by the language of Section 67 of the Public Utilities Act itself.

This Court, in determining that the police power can never be bartered away and that no contract can be made which will interfere with the proper exercise of that power, said:

"Of course, if it appear that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or *that there is wanton or arbitrary interference with private rights, the question arises whether the law-making body has exceeded the legitimate bounds of the police power.*" (Italics are ours.)

Atlantic etc. R. Co. v. Goldsboro, 232 U. S., 548-559.

It may be argued that this Court in another case (*Jett Bros. etc. Co. v. Carrollton,* 252 U. S. 1), has held that it will not interfere with the exercise of a purely discretionary power lawfully vested in a state agency. The statement last above quoted from the *Goldsboro* case, coupled with the statement made by the Supreme Court of California in the *Aller* case, clearly point the distinction between the lawful exercise of an admitted discretionary power and the arbitrary attempt to exercise a power which has no existence in law.

"This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Dodge v. Woolsey, 18 How., 331;

Constitution of the United States, Art. VI;

Robb v. Connolly, 111 U. S., 624.

"The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions

which do not touch this case, ordains, 'Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities. Virginia v. Rives, 100 U. S. 313, 318, 319; Ex parte Virginia, 100 U. S. 339, 346; Neal v. Delaware, 103 U. S. 370-397. And the first one, as said by Chief Justice Waite in United States v. Cruikshank, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in Bank of Columbia v. Okely, 4 Wheat. 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice'."

Scott v. McNeal, 154 U. S., 34-45.

In Conclusion.

While the plaintiffs in error believe that all the errors involved in this case arose upon the failure of the Supreme Court of the State of California to distinguish between the exercise by the State through its Railroad Commission of the lawful power to fix rates for public utility water service and the lack of power in the State, through any of its agencies, to impair the obligations of the contracts in suit, the source of the errors is of less importance than the fact that the errors have been made.

Under the decision of the Railroad Commission, affirmed by the judgment under review, the individual plaintiffs in error and those similarly situated have been denied the equal protection of the laws; their property has been impressed with continuing, uncertain, non-contractual and extra-legal liens and to the extent thereof their property has been taken without due process of law; and, the obligations of their contracts have been impaired.

The plaintiffs in error raise no question concerning the power of the State either to fix public utility water rates in accordance with the principles of law governing such action, nor do they raise any question regarding the power of the State to disregard the prior contracts. They maintain that the State has no power in a public utility rate proceeding before an administrative commission, under the guise of fixing uniform utility rates, to relieve the utility corporation from its contractual obligation to serve water at low rates and at the same time to hold the plaintiffs in error liable to obligations of the contract assumed by them in consideration of the low contractual rates.

In this brief it has been necessary to call attention not alone to errors of law, but to certain errors in statements of fact into which the Honorable Supreme Court of the State of California was led. When the duty of an attorney both to his clients and to an appellate Court demands such an analysis, it seems always proper to close the appeal made on behalf of his clients to the higher Court with an expression of his confidence in and respect for the Court whose judgment is to be reviewed and his regret that it has been led into errors so grievous as to necessitate a review.

Dated, San Francisco,
August 12, 1925.

Respectfully submitted,
F. S. BRITTAIN,
Attorney for Plaintiffs in Error.

BRITTAIN & WEISE,
Of Counsel.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

PERTINENT PORTIONS OF CALIFORNIA LAWS.

(Note): In the following quotations, the italicized portions alone are pertinent to the present case.

"*The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by the law,* provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city, or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city, or town council, or other governing body of such city and county, or city, or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporations collecting water rates in any city and county, or city, or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city, or town, where the same are collected, for the public use."

Cons. California, Art. XIV, Sec. 1.

"There is hereby created a railroad commission which shall consist of five members and which shall be known as the railroad commission of the state of California. The commission shall be appointed by the governor from the state at large; provided, that the legislature, in its discretion, may divide the state into districts for the pur-

pose of such appointments, said districts to be as nearly equal in population as practicable; and provided, further, that the three commissioners in office at the time this section takes effect shall serve out the term for which they were elected, and that two additional commissioners shall be appointed by the governor immediately after the adoption of this section, to hold office during the same term. Upon the expiration of said term, the term of office of each commissioner thereafter shall be six years, except the commissioners first appointed hereunder after such expiration, one of whom shall be appointed to hold office until January 1, 1917, two until January 1, 1919, and two until January 1, 1921. Whenever a vacancy in the office of commissioner shall occur, the governor shall forthwith appoint a qualified person to fill the same for the unexpired term. Commissioners appointed for regular terms shall at the beginning of the term for which they are appointed, and those appointed to fill vacancies, shall, immediately upon their appointment, enter upon the duties of their offices. The legislature shall fix the salaries of the commissioners, but pending such action the salaries of the commissioners, their officers and employees shall remain as now fixed by law. The legislature shall have the power, by a two-thirds vote of all members elected to each house, to remove any one or more of said commissioners from office for dereliction of duty or corruption or incompetency. All of said commissioners shall be qualified electors of this state, and no person in the employ of or holding any official relation to any person, firm or corporation, which said person, firm or corporation is subject to regulation by said railroad commission and no person owning stock or bonds of any such corporation or who is in any manner pecuniarily interested therein, shall be appointed to or hold the office of railroad commissioner. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission. The act of a majority of the commissioners when in session as a board shall be deemed to be the act of the commission; but any investigation, inquiry or hearing which the commission has power to undertake or to hold may be undertaken or held by or before any commissioner designated for the purpose by the commission, and every order made by a

commissioner so designated, pursuant to such inquiry, investigation or hearing, when approved or confirmed by the commission ordered filed in its office, shall be deemed to be the order of the commission.

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission, than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpoenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this Constitution, and the authority of the legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.

The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the 'Railroad Commission Act' of this state approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same

force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said act shall be held and construed to be the five commissioners provided for herein."

Cons. California, Art. XII, Sec. 22.

"*Every private corporation*, and every individual or association of individuals, *owning, operating, managing, or controlling any* commercial railroad, interurban railroad, street railroad, *canal, pipe-line, plant, or equipment*, or any part of such railroad, canal, pipe-line, plant, or equipment within this state, for the transportation or conveyance of passengers, or express matter, or freight of any kind, including crude oil, or for the transmission of telephone or telegraph messages, or *for* the production, generation, transmission, *delivery or furnishing of* heat, light, *water* or power or for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public, and every common carrier, *is hereby declared to be a public utility subject to such control and regulation by the railroad commission as may be provided by the legislature, and every class of private corporations*, individuals, or associations of individuals *hereafter declared by the legislature to be public utilities shall likewise be subject to such control* and regulation. *The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. From and after the passage by the legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time of the passage of*

such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the railroad commission as provided by law; and provided, further, that where any such city and county or incorporated city or town, shall have elected to continue any of its powers to make and enforce such local, police, sanitary and other regulations, other than the fixing of rates, it may, by vote of a majority of its qualified electors voting thereon, thereafter surrender such powers to the railroad commission in the manner prescribed by the legislature; and provided, further, that this section shall not affect the right of any city and county or incorporated city or town, to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law. *Nothing in this section shall be construed as a limitation upon any power conferred upon the railroad commission by any provision of this Constitution now existing or adopted concurrently herewith.*"

Cons. California, Art. XII, Sec. 23.

"(a) 1. No common carrier subject to the provisions of this act shall engage or participate in the transportation of persons or property, between points within this state, until its schedules of rates, fares, charges and classifications shall have been filed and published in accordance with the provisions of this act.

2. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in

its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares or charges so specified, except upon order of the commission as hereinafter provided, nor extend to any corporation or person any privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons.

3. No common carrier subject to the provisions of this act shall, directly or indirectly, issue, give or tender any free ticket, free pass or free or reduced-rate transportation for passengers between points within this state, except to its officers, agents, employees, attorneys, physicians and surgeons, and members of their families; to ministers of religions, traveling secretaries of railroad men's religious associations, or executive officers, organizers or agents of railroad employees' mutual benefit associations giving the greater portion of their time to the work of any such association; inmates of hospitals or charitable or eleemosynary institutions, and persons exclusively engaged in charitable or eleemosynary work, and persons and property engaged or employed in educational work or scientific research or in patriotic work when permitted by the commission; to the executive officers of mercantile or promotion boards or bodies within this state when traveling in the performance of duties affecting the advancement of the business of such boards or bodies, or the development of trade or industry within or without this state, when authorized by the commission; to hotel employees of season resort hotels, when authorized by the commission to indigent, destitute and homeless persons and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge; to necessary caretakers, going and returning, of live stock, poultry, milk, fruit and other freight, under uniform and nondiscriminatory regulations; to employees of sleeping-car corporations, express corporations and telegraph and telephone corporations; to railway mail service employees,

United States internal revenue officers, post-office inspectors, customs officers and inspectors and immigration inspectors when traveling in the course of their official duty; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the carrier is interested, persons injured in accidents or wrecks and physicians and nurses attending such persons; provided, that the term 'employees', as used in this section, shall include furloughed, pensioned and superannuated employees, persons who have become disabled or infirm in the service of any such carrier, ex-employees traveling for the purpose of entering the service of any such carrier, and the remains of persons dying while in the employment of any such carrier; and the term 'families', as used in this section, shall include the families of those persons heretofore named in this proviso, and the families of persons killed, and the widows during widowhood and minor children during minority of persons who died while in the service of any such carrier; and provided, further, that no free ticket, free pass or free or reduced-rate transportation shall be issued, given or tendered to any officer, agent or employee of a common carrier, who is at the same time a shipper or receiver of freight, or an officer, agent or employee of a shipper or receiver of freight, unless such officer, agent or employee devotes substantially his entire time to the service of such carrier; and provided, further, that the members of the railroad commission, their officers and employees, shall be entitled, when in the performance of their official duties, to free transportation over the lines of all common carriers within this state; and provided, further, that passenger transportation may issue to the proprietors and employees of newspapers and magazines and the members of their immediate families, in exchange for advertising space in such newspapers or magazines at full rates, subject however to such reasonable restrictions as the commission may impose.

Nothing in this act contained shall be construed to prohibit the issue by express corporations of free or reduced-rate transportation for express matters to their officers, agents, employees, attorneys, physicians and surgeons, and members of their families, or the interchange of free

or reduced-rate transportation for passengers or express matter between common carriers, their officers, agents, employees, attorneys, physicians and surgeons, and members of their families, where such common carriers are subject in whole or in part to the jurisdiction of the commission or of the interstate commerce commission, or where such common carriers, though not in whole or in part subject to the jurisdiction of this commission or of the interstate commerce commission, but which are engaged in the business of transporting passengers and freight by water between the United States and foreign countries, and are permitted by the interstate commerce act to interchange such free transportation with common carriers which are subject to the jurisdiction of the interstate commerce commission or to the jurisdiction of this commission; provided, that such express matter be for the personal use of the person to or for whom such free or reduced-rate transportation is granted, or of his family; nor to prohibit the issue of reduced-rate transportation by a common carrier to children attending an institution of learning; nor to prohibit the issue of passes or franks by telegraph or telephone corporations to their officers, agents, employees, attorneys, physicians and surgeons, and members of their families, or the exchange of passes or franks between such telegraph and telephone corporations or between such corporations and such common carriers, for their officers, agents, employees, attorneys, physicians and surgeons, and members of their families; nor to prevent the carrying out of contracts for free or reduced-rate passenger transportation heretofore made, founded upon adequate consideration and lawful when made; nor to prevent a common carrier from transporting, storing or handling, free or at reduced rates, the household goods and personal effects of its employees, of persons entering or leaving its service, and of persons killed or dying while in its service.

4. Every common carrier subject to the provisions of this act may transport, free or at reduced rates, persons or property for the United States, state, county or municipal governments, or for charitable purposes, or for patriotic purposes, or to provide relief in cases of general epidemic, pestilence or other calamitous visitation, and prop-

erty to or from fairs or expositions for exhibit thereat; also contractors and their employees, material or supplies for use or engaged in carrying out their contracts with said carriers, for construction, operation or maintenance work or work incidental thereto on the line of the issuing carrier, to the extent only that such free or reduced-rate transportation is provided for in the specifications upon which the contract is based and in the contract itself. Common carriers may also enter into contracts with telegraph and telephone corporations for an exchange of service.

(b) *Except as in this section otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals and charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time, nor shall any public utility engaged in furnishing or rendering more than one product, commodity or service, charge, demand, collect or receive a greater or less, or different compensation for the collective, combined or contemporaneous furnishing or rendition of two or more of such products, commodities or services, than the aggregate of the rates, tolls, rentals or charges specified in its schedules on file and in effect at the time, applicable to each such product, commodity or service when separately furnished or rendered, nor shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals and charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons; provided, that the commission may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable as to each public utility.''*

Public Utilities Act, Sec. 17; Cal. Stat., 1921, p. 1355.

''No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any pref-

erence or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section."

Public Utilities Act, Sec. 19; Cal. Stat., 1915, pp. 115-127.

"Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court of this state for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown the same be continued. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. *The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and findings and conclusions of the commission on reasonableness and discrimination.* The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. *Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission.* The pro-

visions of the Code of Civil Procedure of this state relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the Supreme Court under the provisions of this section. *No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties;* provided, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases."

Public Utilities Act, Sec. 67; Cal. Stat., 1915, pp. 115-161.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 73.

LIVE OAK WATER USERS' ASSOCIATION, BUTTE COUNTY FARM BUREAU, SUTTER COUNTY FARM BUREAU, ET AL., PLAINTIFFS IN ERROR,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA AND SUTTER-BUTTE CANAL COMPANY.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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It is not the purpose in this brief to indulge in extended argument in reply to that presented by the defendants in error in their respective briefs.

In both those briefs appear certain statements of fact, and of the application of some decisions of this Court which require comment.

While the authorities relied on by the defendants in error are largely the same, their argumentative use of them differs to such an extent that it is believed an analysis of them will be helpful to the court.

Analysis of Authorities Cited by the Defendants in Error.

Allen v. Railroad Commission, 179 Cal., 68:

The only application of this case to the facts here involved is shown on pages 52 and 78 of the brief of the plaintiffs in error. The citation on page 31 of the brief of the Sutter-Butte Canal Company is to a proposition which was not determined in the *Allen* case, and which is in conflict with the provisions of Section 1 of Article XIV of the Constitution of California. That section in terms provides that the use of the water is a public one, and "subject to the regulation and control of the State, in the manner to be prescribed by law" (Appendix, opening brief, i).

Arkansas Natural Gas Co. v. Arkansas R. R. Com., 261 U. S., 379:

On page 48 of the brief of the Sutter-Butte Canal Company this case is cited in support of the proposition that if the plaintiffs in error desire to be relieved from the pre-existing contracts, the courts of general jurisdiction, and not the rate-fixing agency of the State, are the tribunals established to pass upon and determine the contractual rights of the parties. The question of rescission is not involved here.

It is pointed out on page 63 of the opening brief that in the judgment under review the Supreme Court of California determined that the new rates fixed by the Railroad Commission became a lien upon the lands of the plaintiffs in error and might be foreclosed as such. This determination if permitted to stand is a final adjudication binding the plaintiffs in error in all subsequent litigation which may

arise on the contracts. It is a judgment that the contracts have once been altered by the order of the Railroad Commission, and that the Commission, in a proceeding instituted by it of its own motion, is vested with power at any time to alter again the contracts it has once re-written.

The plaintiffs in error object to the unlawful impairment of the obligations of their perfectly valid contracts. They were satisfied with the contracts. The Sutter-Butte Canal Company desired to be relieved from its contractual obligation to supply water to the contract-holders at the contract price. The Railroad Commission, acting within its admitted powers, did relieve the Sutter-Butte Canal Company of that obligation by the order generally increasing the rates for water service. If the order had stopped there, the plaintiffs in error would have had no cause for complaint. The Commission did not stop at the line which limited its power in the premises, but went far afield when it purported to make an entirely new contract by writing into the old one the new legislative rate.

Upon the matter of rates the contract bound the Canal Company to deliver water at a low rate per acre per annum. In consideration of this obligation the consumer agreed that the low rate should be applied to the entire acreage of his farm and should be secured by a lien upon it. The state had power to fix legislative rates to which the contract must yield, but it is too clear for argument that a change in any one term of the contract could not be made without destroying its mutuality, and thereby impairing its obligations.

The quotation on page 48 of the brief of the Sutter-Butte Canal Company from the *Arkansas Natural Gas Co.* case supports the plaintiffs in error. In the light of the facts of the present case it appears to be determinative of all pretense of defense asserted here.

Butte County Water Users' Association v. Railroad Commission, 185 Cal., 218-224:

This case is referred to on pages 31 and 39 of the brief of the Sutter-Butte Canal Company, and pages 39 and 45 of the plaintiff's brief.

In the present case, argument upon what may happen if and when the State exercises its reserved power to control the use of appropriated waters would only serve to cloud the very clear issues presented by the opening brief. The only concern of the Court in this case is whether or not the plaintiffs in error have been denied that constitutional protection on which they firmly rely. The Court will not undertake to determine the possible legal effect of something which may never occur.

Detroit, etc., Co. v. Fletcher Paper Co., 248 U. S., 30:

This case is cited on page 57 of the Sutter-Butte Canal Company's brief, to the proposition that the plaintiffs in error have had their day in court on every issue involved.

A reading of the concise opinion of Mr. Justice Holmes in that case shows its inapplicability to the present case. In the Supreme Court of California the plaintiffs in error set up and relied upon their claims under the Constitutional guaranties. That court determined that it was without jurisdiction to inquire whether or not the classification made by the Railroad Commission deprived the plaintiffs in error of their property without due process of law or denied them the equal protection of the law. The California Court avoided direct reference to the Federal Constitution. The entire record of the case, as well as the opinion filed in the Supreme Court of California upon which the judgment under review was entered, shows clearly that the decision could not have been rendered without a denial of the plaintiffs' claims of constitutional protection. The jurisdiction of this Court is invoked because of the manifest errors of the Supreme Court of California. If it should be held that in any case where a Federal question is presented in the State Court, its decision is final, Section 237 of the Judicial Code is meaningless, and

the guaranties of the Constitution of the United States may be swept aside by the Supreme Court of any State.

Gooding v. Idaho Irrigation Co., 265 U. S., 518:

This case is cited, on page 40 of the brief of the Sutter-Butte Canal Company, as supporting the proposition that, under the contracts in suit, the plaintiffs in error have a vested right in a fixed quantity of water to be delivered to them before the distribution of water to new consumers. With this statement the plaintiffs in error have no fault to find.

Of course, this right is subject to the police power of the State to apportion all water to meet the needs of all the members of the community who must rely upon the same source of water supply. The decision of Mr. Justice Sutherland in that case was based on the particular provisions of contracts and statutes there involved. They differ in many respects from the contracts now under consideration and the laws of California.

Henrici v. South Feather Land, etc., Co., 177 Cal., 442:

This case is cited on page 30 of the Sutter-Butte Canal Company's brief. By way of argument the court stated what was decided in an earlier case. It does not appear to strengthen the argument of the defendants in error.

The case was decided upon the proposition that the interest of the land owner in contracts for water service made appurtenant to the land is an interest in real property. Applying the rule to the present case, under the existing contracts the plaintiffs in error have an interest in real property. They are satisfied with their contracts. They recognize the power of the State to regulate and control the amount of water served to them, and to fix by legislative action the rates they are to pay for whatever water is served. They maintain that the State has no power to impair the

obligations of their contracts in regard to their real property interests or in any other respect.

If this case has any application to the case at bar, it is to emphasize the somewhat brusque suggestion, contained in the briefs of both the defendants in error, that if the contract-holders are dissatisfied with the action of the Commission they may sue to rescind the contracts. Upon what possible theory consistent with right and justice can the plaintiffs in error be forced to submit, first, to an unwarranted impairment of their contracts, and, secondly, because of it compelled to yield their interests in real property in suits to rescind contracts which are valid and binding?

Limoneira, etc., Co. v. Railroad Commission, 174 Cal., 232:

This case is cited in a foot-note on page 8 of the brief of the Railroad Commission. So far as the case is applicable here, it is analyzed on page 44 of the opening brief.

It is referred to in the brief of the Commission in support of the statement that the Commission has jurisdiction to alter the rates named in a contract between a public utility and its consumers.

The statement, which is repeated in different language in various parts of the briefs of both defendants in error, is both true and untrue, depending upon the emphasis or punctuation used. There is no doubt of the power of the State, through the Commission, legislatively to fix rates different from the pre-existing contractual rates. Neither ought there to be any question about the lack of power of the Commission to substitute the new legislative rates *in the contract* in lieu of the contractual rates. This distinction marks the pivotal point of the entire case in this Court.

If the plaintiffs in error are bound, as they are perfectly willing to be, by the legislative rates, and if they are treated as other consumers who similarly are bound by those rates,

they will be permitted to designate annually, as are other consumers, the acreage for which they desire irrigation each year. They will pay the legislative rates upon that acreage, as do other consumers; and those rates will be collected from them in exactly the same way they are collected from other consumers. Their lands will no more be burdened with a lien to secure the payment of the legislative rates than are the lands of other consumers.

If, on the other hand, their contracts are rewritten and the legislative rates substituted for the old contractual rates *in the contract,* they will be compelled to pay the new rates applied to the entire acreage of their respective holdings, while other consumers pay only upon the acreage which they are permitted annually to designate for irrigation; they will be denied the privilege accorded to other consumers annually to designate what lands they desire to irrigate; and their lands will be burdened by a lien for an amount to which they have never agreed, to secure an obligation which they never assumed, while the lands of other consumers will be free from any such lien.

In the one case the fundamental rule of public utility rate-making which requires similar treatment of similarly situated consumers will be satisfied; in the other the contract consumers will be required to pay large sums of money which should be uniformly spread among all the consumers.

Law v. Railroad Commission, 184 Cal., 737:

This case is cited on pages 3 and 8 of the brief of the Railroad Commission, and on page 33 of the brief of the Sutter-Butte Canal Company. It is analyzed on pages 46 and 47 of the opening brief, and its direct application to the present case is there shown. The plaintiffs in error rely upon it.

N. Y. C. & H. R. R. R. Co. v. Gray, 239 U. S., 583:

This case is referred to on pages 45 and 46 of the brief of the Sutter-Butte Canal Company, and is cited for argumentative purposes on page 49 of the opening brief.

In the brief of the Sutter-Butte Canal Company, it is said that it is the only decision of this Court relied upon by the plaintiffs in error to support their claim that the Commission was bound to set aside the provision of the contract making the whole of the lands of the contract-holding consumers chargeable, whether all the land was or is irrigated or not.

The plaintiffs in error never made any such claim. The case was cited solely to show that, when the State in the exercise of its police power lawfully deals legislatively in any way with the subject-matter of a pre-existing contract, the contract must yield in all its parts to the exercise of the superior power. The contract in such a case is not changed. It simply cannot be enforced in those matters properly within the legislative control.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S., 287:

This case is cited in the brief of the Railroad Commission on page 23, apparently for the sole purpose of showing that it has nothing to do with the present case.

Palermo Land & Water Co. v. Railroad Commission, 173 Cal., 380:

This case is cited on pages 3, 8 and 14 of the brief of the Railroad Commission, and page 29 of the brief of the Sutter-Butte Canal Company. It is referred to on page 43 of the opening brief, where it is shown that the contracts then before the court contained the express provision that the water should be served "at such rates as may be fixed by law in the district in which said lands are situated." The Supreme Court of California, commenting on this language, said:

> "In the very inception of the contract, therefore, it appears that the parties contemplated that the rates to be charged should be those fixed by public authority."

In the present case, there is not in the record, nor in the brief of either of the defendants in error, and there was not in fact, any suggestion of the existence of an express provision in the contracts upon the subject of rates to be fixed by public authority. When the contracts were entered into the parties were charged with knowledge that under its police power the State might at any time assume control of the use of the water and in such an event it might by law fix the rates of service. They were charged with notice also that if and when the State should exercise this superior power, their agreement on those subjects would have to yield to the State's action. As there was no express stipulation in the contracts that the legislative rates should be written therein, so there was no implied agreement that the State might change the contracts. Under the police power alone the State cannot change contracts, though it may make them non-effective.

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S., 184:

This case is cited in the brief of the Railroad Commission to the proposition that discrimination based on reason and justice may properly exist. At this late date, it is inconceivable that any lawyer would contend that classification is of itself unlawful. In the present case the plaintiffs in error maintain that one of the evil results of the re-writing of their contracts has been to force both the Railroad Commission and the Supreme Court of California to declare that Sutter-Butte Canal Company have been classified into two the similarly situated consumers of water supplied by the groups, *i. e.*, the non-contract class and the contract class.

This classification, the record shows, is not based upon any different characteristics of service. The plaintiffs in error maintain that it is purely arbitrary, and, therefore, constitutes a denial to them of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitu-

tion of the United States. No attempt is made in the brief of either defendant in error to show that there is any reason for the classification, other than that stated in the opinion rendered by the Supreme Court of California, to the effect that the Sutter-Butte Canal Company needed the additional money which the order of the Commission would produce, if the contract consumers should be compelled to pay the new and increased statutory rates upon the entire acreage of their farms, regardless of whether or not they should desire or receive any water in any particular year.

This entire subject is discussed in the fifth subdivision of the opening brief. In this connection the attention of the Court is particularly directed to the statement at the bottom of page 73 of that brief, and what immediately follows it.

Producers' Transportation Co. v. Railroad Commission, 251 U. S., 228:

This case is cited on page 8 of the Railroad Commission's brief, and on page 49 of the Sutter-Butte Canal Company's brief. The opinion was by Mr. Justice Van Devanter. A judgment of the Supreme Court of California was affirmed. It was decided that the Producers' Transportation Co. was operating a public utility; that such a utility cannot, by making contracts for future transportation, prevent or postpone the exertion by a State of the power to regulate rates and practices; and that the contract clause of the Constitution does not interpose any obstacle to the exertion of that power.

The first matter decided has no bearing upon the present case. With the other two matters the plaintiffs in error are in entire accord. In the present case, there is no contention that the Railroad Commission has not power to fix rates for water. It is maintained that that power exists; and that when the State exercises it all pre-existing contracts must yield. This does not mean, however, that the new legislative rates can be forced into the old contracts, and so disturb the

balance of concurrent obligations which, in the contracts, either benefited or burdened the parties to them.

Southern Pacific Co. v. Spring Valley Water Co., 173 Cal., 291:

This case is cited on page 3 of the Railroad Commission's brief, to the proposition that contracts such as those before the Court are valid and binding on the parties. It is also cited on page 28 of the Sutter-Butte Canal Company's brief, to the proposition that the contract creates an easement or servitude in real property. It is analyzed on pages 42 and 52 of the opening brief.

Stanislaus Water Co. v. Bachman, 152 Cal., 716:

Cited on page 14 of the Railroad Commission's brief, and pages 27 and 44 of the brief of the Sutter-Butte Canal Company. It is also cited on page 40 of the opening brief. It has no direct bearing upon the issues now before this Court.

Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S., 372:

Cited on page 8 of the Railroad Commission's brief, and page 49 of the brief of the Sutter-Butte Canal Company.

All that was decided was that, when the State validly exercises its police power to fix reasonable rates to be charged by a public service corporation, those rates supersede rates fixed in pre-existing contracts. The case upholds each of the first three axiomatic statements set forth on page 2 of the opening briefs. The decision is not authority for the statement made by the Supreme Court of California and the Railroad Commission of that State that the State has power to change the contracts by inserting in them the new legislative rates in place of the old contractual rates.

In the brief of the Sutter-Butte Canal Company, in commenting upon the *Union Dry Goods Co.* case, it is stated:

> "We fail to find any language in the opinion of this Court to the effect that the contract was affected in any other way than that the rates therein fixed were superseded."

This statement represents exactly what all the cases of this Court dealing with the subject reflect. In not one of them is there the least suggestion that the contracts are changed in any way when the statutory rates are made to apply. The plaintiffs in error from the beginning have maintained that the legislative rates in the particular case do apply: that the contracts yield to them; and that the contracts are not in any other way affected. They maintain that the liens for which they agreed have no force, because no rates *become due under the contracts;* and the only lien they agreed upon was to secure the payment of the contractual rates.

They also maintain that the agreement to pay the contractual rates applied to the entire acreage of their farms has no further force because the new rates do not *become due under the contracts* but by virtue of the law. They maintain that under the law they are entitled to be treated exactly as are other similarly situated consumers of water.

In Conclusion.

Attention has been called to the suggestion on page 45 of the brief of the Sutter-Butte Canal Company that the only case cited in the opening brief closely applicable to the facts of the present case was that of the *New York Central & Hudson River R. R. Co. v. Gray,* 239 U. S., 583.

It is assumed that the learned counsel for the Railroad Commission and the Sutter-Butte Canal Company have been at least as diligent in their search for cases directly in point as the attorneys for the plaintiffs in error. The only cases referred to in the briefs of the defendants in error bearing

upon the subject, uniformly hold that when in the exercise of its police power a State fixes rates, all pre-existing contracts must yield to the new rates. No case is cited by the defendants in error, which holds that the statutory rates, when established, are written into the pre-existing contracts. A most thorough examination of cases decided by the highest courts of the several States, and by this Court, has failed to disclose one from which it might be gleaned that any public service commission, under the guise of establishing legislative rates, has ever tried to remodel pre-existing contracts, until this was attempted by the Railroad Commission of California in the present case.

After the opening brief was filed attention was called to the case of *Southern Utilities Co. v. City of Palatka*, U. S. Supreme Court advance sheets, 69 L. Ed., No. 15, p. 583. The case was decided May 11, 1925. Mr. Justice Holmes delivered the opinion of the court. The City of Palatka sued to restrain the utility company from charging more than the rate alleged to have been fixed by the ordinance under which the utility company was granted its franchise. The company pleaded that to enforce the contractual rate would deprive it of its property without due process of law, because the contractual rate was unreasonably low.

The Supreme Court of Florida held that the city had power to grant the franchise and make the contract, that it had no power, of its own motion, to withdraw, but that the legislature had unfettered power to regulate the rates. The defendant contended that there was lack of mutuality, and that it could not be held to rates that, in the absence of contract, it would be unconstitutional to impose.

This Court held that the fact that "the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed." In the opinion it was then said:

> "Such a notion, logically carried out, would impart new and hitherto unsuspected results to the power to amend the Constitution or to exercise eminent domain."
>
> (Southern Utilities Co. *v.* City of Palatka, 15 U. S. Supreme Court advance opinions, 1924-25, p. 584.)

In the present case if the decision of the Supreme Court of California is permitted to stand, the result would be in effect an amendment to the Constitution under which contracts would no longer be inviolable. In the City of Palatka case this Court clearly distinguished between fixing rates for public utility service which should supersede pre-existing contracts, and the altering the contracts themselves.

On page 42 of the brief of the Sutter-Butte Canal Company, reference is made to the great number of contracts for the service of water, gas, electricity, etc., made by public service corporations; and it is said that—

> "A declaration by this Court that a State can, through any agency thereof, upon changing the contract rates, set aside, at the instance of either party to any such contract, any provision thereof which is no longer desirable to such party, would produce incalculable evil consequences."

The position of the plaintiffs in error is that the State cannot, through any agency, change the contract rates. It may establish new legislative rates. When it does so, they prevail over the contract rates.

If the quotation from the brief of the Sutter-Butte Canal Company last made should be remodeled to express the true condition, it would be entirely consistent with the claims of the plaintiffs in error. As so remodeled it would read:

> "A declaration by this Court that a State can, through any agency thereof, upon establishing legislative rates, at the instance of either party to any such contract, change any provision hereof which is no longer desirable to such party, would produce incalculable evil consequences."

Such a declaration would leave it to the public service commission of any State to modify and reform any valid contract of any public service corporation, at the instance of the utility company, in utter disregard of the provisions of section 10 of Article I of the Constitution of the United States, prohibiting any State from passing any law impairing the obligations of contracts.

This Court, in the case of *Muscatine Lighting Co.* v. *City of Muscatine*, 255 U. S., 539-546, found no difficulty in drawing that distinction. Three suits were combined. Three public service corporations were supplying electricity or gas to certain municipalities. The ordinances conferring franchises to use of the city streets contained a schedule of maximum rates. The suits were to enjoin the municipalities to prevent the enforcement of those rates on the ground that they were so unreasonably low that their continued enforcement would amount to confiscation.

The opinion was written by Mr. Chief Justice White. After reciting the facts, he said that two propositions were indisputable: (a) that, although governmental agencies may fix and enforce reasonable rates to be paid public utility corporations for services rendered, that power does not include the right to fix rates which are so low as to be confiscatory; and (b) that where the public service corporations and the governmental agencies have power to contract concerning rates and exert that power by fixing, by contract, rates to govern a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial.

In the statement of these two indisputable propositions, this Court must have had in mind, and it pointed out, the essential difference between the statutory rates, which must meet certain legal requirements, and the contractual rates, concerning which those requirements had no application.

Later in the opinion (page 545), it was pointed out that

the statute involved in that case, in positive terms, prohibited any abridgement of the right to regulate and fix charges of public service corporations.

This Court reached the conclusion that the municipalities were without power to contract for rates; hence without the right to enforce, "as the result of the obligation of a contract," the concededly confiscatory rates, and therefore, that the court below committed error "in enforcing such rates upon the theory of the existence of a contract."

In this case, the plaintiffs in error maintain, the State has power legislatively to fix rates. In that case there were no valid pre-existing contracts. In this case there were valid pre-existing contracts; and when the rates were fixed by legislative authority, the contracts necessarily yielded to the legislative action, but the contracts in all their parts remained as originally written. If, by reason of the exercise of the superior police power, either party became either unable to perform or unable to demand performance under the contract, they would be exactly in the position of Mr. Gray in the *New York Central & Hudson River R. R.* case, free to seek any relief consistent with the facts in the ordinary courts of law. Such relief would necessarily be based on the contracts as originally written.

By the decision of the Railroad Commission of California, and the judgment of the Supreme Court of that State affirming the Commission's decision, the plaintiffs in error are deprived of recourse to the ordinary courts of law, by an adjudication, binding in form, that their contracts have been altered, notwithstanding the prohibition of section 10 of Article 1 of the Constitution.

Respectfully submitted,

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BRITTAIN & WEISE,
Of Counsel.

(7952)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 73

LIVE OAK WATER USERS' ASSOCIATION, BUTTE COUNTY FARM BUREAU, SUTTER COUNTY FARM BUREAU, et al.,
Plaintiffs in Error,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and SUTTER-BUTTE CANAL COMPANY,
Defendants in Error.

Upon Writ of Error to the Supreme Court of the State of California.

BRIEF OF DEFENDANT IN ERROR, RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

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Upon Writ of Error to the Supreme Court of the State of California.

BRIEF OF DEFENDANT IN ERROR, RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

This is a proceeding by writ of error in which plaintiffs assert that the Supreme Court of California erred in affirming a certain order of the Railroad Commission of that State. That order fixed a sched-

ule of rates to be charged by the Sutter-Butte Canal Company, a corporation which operates an extensive public utility water system for irrigation purposes in the Sacramento Valley, and is subject to the regulatory jurisdiction and control of the State Railroad Commission. The general authority of that Commission to establish rates upon this system is not here questioned.

This public utility and its predecessor had entered into written contracts with numerous owners of lands under its ditches by which it agreed to serve them with water at specified rates upon lands described in the respective contracts and to which the contracts and water service were in terms made "appurtenant." The land owners on their part (among other things not pertinent here), paid to the Company (save in a very few instances) an initial sum, ordinarily either five or ten dollars, for every acre included under their respective contracts, and agreed (1) to pay an annual rate or charge of a stipulated sum per acre for all the acres covered in the contracts, regardless of the particular acreage actually irrigated during the year in question, and (2) that, in case of default in any such payments, a lien in favor of the company should vest upon all the land covered by the contract in question, again irrespective of the amount of such land actually irrigated during the season. The land owners also granted to the Canal Company rights of way through their land and rights of entry thereon.

Contracts of this nature on the part of public utilities, have been held by the California Supreme

Court to be valid and binding upon the parties,[1] and to create a present and continuing burden or servitude upon the waters of the contracting utility in favor of the lands to which these waters have, by contract, been made "appurtenant."[2] They are, however, subject to change by the regulatory body in so far as rates may have been attempted to be fixed in them,[3] and in the present instance the Railroad Commission, after an extensive hearing and investigation, acted to change the rates stipulated in these contracts by establishing a completely revised schedule of rates for all consumers of this company, including: (1) rates for metered service; (2) rates for various types of service to consumers not holding contracts, and (3) rates for similar types of service to holders of contract,—which rates were fixed materially lower than the rates applicable to non-contract holders because the Commission felt it just and proper to give some recognition to the initial payments which had been made in order to obtain such contracts, as well as to the fact that these consumers constituted a more permanent class of water purchasers than the mere year-to-year consumers. It was provided that any consumer might have the advantage of these lower rates by paying an initial sum of ten dollars ($10.00) for each acre which he might desire to bring under this class.

Except as to rates, the Commission did not attempt (in fact, expressly disclaimed any attempt) to change

(1) *Southern Pacific Company v. Spring Valley Water Co.*, 173 Cal. 291 (1916).
(2) *Palermo Land and Water Company v. Railroad Commission*, 173 Cal. 380 (1916).
(3) *Law v. Railroad Commission*, 184 Cal. 737 (1921).

any of the provisions of these contracts, and the effect of this rate order, as a matter of law, on those other provisions was left by the Commission for determination by the courts as the occasion might arise.

PLAINTIFFS' POSITION.

Plaintiffs, who are or represent contract holders, admit the general principle that the rates set forth in their contracts were subject to change by the Railroad Commission and that this rate modification did not, of itself, operate to impair their obligation. Indeed, recognizing the financial needs of the utility as found to exist by the Railroad Commission, they do not complain of the rates fixed as such. They contend, however, that when the contract rates were changed the other provisions of the contracts (particularly those providing for annual payments upon all the lands described therein, and for liens to secure such payments) were, as a matter of law, superseded and *ipso facto* rendered of no further force or effect. They therefore insist that the new rates cannot be applied to any acreage not actually irrigated during any particular season, and the prayer of their petition for Writ of Review in the State Supreme Court was that the Commission's order be annulled,

> "In so far as the same makes provision for the collection of rates upon any acreage other than that upon which water may be desired by these petitioners." (Transcript of Record, p. 12, fol. 16.)

At the same time, however, they assert and insist that the Commission by thus changing their rates has

somehow created new, burdensome and uncontemplated liens upon their lands, and also, in the face of the lower rates which were accorded them, they urge that the enforcement of the order will give rise to an unjust and unlawful discrimination against them which they claim the State Supreme Court erred in not annulling. How the provisions of the contracts other than those setting forth rates, could be both superseded and still in full force and effect at one and the same time plaintiffs do not attempt to explain.

DEFENDANT RAILROAD COMMISSION'S POSITION.

In defense of its order and of the State Supreme Court's decision affirming it, the Railroad Commission takes the position that it has acted strictly within its undoubted jurisdiction. As above mentioned, plaintiffs do not attack the new rates as such, and their assumption that new and uncontemplated liens have somehow been fixed upon their lands by the Railroad Commission merely because it has changed their rates seems to us wholly unwarranted.

What the Commission did, and all that it did, was to establish a new schedule of rates for *all* the consumers of this company, including these contract-holders. This act was within the Commission's undoubted jurisdiction, and it can scarcely be argued that its authority may be defeated merely because these contracts happen to contain a provision for a lien to cover unpaid bills. The Commission did not, nor did it attempt to fix any lien of any sort or char-

acter upon the lands of these plaintiffs. Plaintiffs do not allege or suggest any attempt on the part of any one to enforce any such lien, and have, indeed, set up what appears to be a straw man. As was said by the State Supreme Court in the decision here in question:

> "The Railroad Commission did not attempt to change, limit, modify or abrogate any of the provisions of said contracts. A decision on the question of liens, as well as other questions of a purely legal character, was reserved by the Railroad Commission for adjudication by the courts." (Transcript of Record, p. 138.)

This is not, nor could it be construed to be, an action to enforce such a lien. If the Canal Company desires to attempt this it will have to do so in some appropriate manner, and before some proper tribunal which will then determine the present force and validity of these provisions. What plaintiffs here contend involves purely a question of the legal effect of this rate order, rather than of its essential validity.

On the other hand, the mere fact that the Commission has changed the contract rates cannot, of itself, operate to rescind the contracts, to take away rights which may have vested under them, or to alter any of their other provisions. Rescission demands some conscious, some voluntary *act*. If, as a matter of law, these contract holders possess a right to rescind their contracts because of this change in rates—a matter which we do not believe to be in issue here—let them assert it in some proper manner and, if successful, become non-contract consumers, surrendering at the

same time whatever they may have of value under their contracts.

In any event, it appears that this is not the proper proceeding in which to raise either of these issues. The Commission's reference to these contracts, in so far as was deemed necessary for the purpose of classifying the consumers for rate-fixing purposes, did not place in issue all of the contractual rights which might arise therefrom. In this proceeding the sole question before the Court is the essential jurisdiction of this administrative body to fix rates for this public utility to charge. And this is admitted by plaintiffs. Questions involving the interpretation of the order, or its applicability to the peculiar and varying situations of individual consumers are extraneous and not properly cognizable in this proceeding.

Upon the question of discrimination, it is the Commission's position that the Supreme Court of California properly determined that its jurisdiction did not include authority to review the finding made by the Railroad Commission. Inasmuch, however, as the State Supreme Court did *in fact* proceed to consider and review the evidence upon which the Commission made its finding, and inasmuch as upon such consideration it did, *in fact,* find that no unjust discrimination existed, it is the Commission's further position that plaintiffs have had the advantage of the complete judicial review upon this question for which they now contend, and that this determination will not be further reviewed by this Honorable Court. In any event, we not only deny any unjust or unrea-

sonable discrimination against these plaintiffs, but we believe that, if anything, they have been accorded preferential treatment. (Of course, there is no complaint here as to such possible preferential treatment, by anyone claiming to be prejudicially affected thereby.)

THE ISSUE.

In view of the fact that the Railroad Commission's order here in question did not attempt to go farther than to change the rates set forth in these contracts, it appears to us, as indicated above, that the sole issue properly before this Court in this proceeding is one which plaintiffs themselves admit must be determined in favor of the defendants; to-wit, the issue whether the Railroad Commission has jurisdiction to alter the rates named in a contract between a public utility and its consumers. Such jurisdiction has been repeatedly upheld by this Court in numerous decisions, including *Producers Transportation Co. v. Railroad Commission of California,* 251 U. S. 228; 64 L. ed. 239 (1919), involving the very State Constitutional and Statutory provisions here in question, and *Union Dry Goods Co. v. Georgia P. S. Comm.,* 248 U. S. 372; 63 L. ed. 309 (1919), the leading recent case. The Supreme Court of California has also frequently recognized this doctrine as applicable to the California Railroad Commission,[4] and, indeed, plaintiffs do not deny its applicability.

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(4) *Palermo Land & W. Co. v. Railroad Commission*, supra; *Limoneira etc. Co. v. Railroad Commission*, 174 Cal. 232; *Law v. Railroad Commission*, supra.

All other questions appear to us to be beyond the issues of this proceeding, and to involve a mere interpretation of the legal effect of this order, rather than its essential validity. However, since plaintiffs have discussed a number of other alleged issues, all growing out of their contention that, in spite of what it said it was doing, the Railroad Commission has somewhow changed the provisions of their contracts other than those relating to rates, and since plaintiffs contend that certain of their rights under the provisions of the Federal Constitution have thus been violated, while we feel that these federal questions are not properly at issue in its present proceeding, we shall briefly discuss these problems under the following heads:

1. The enforcement of this order will not result in the impairment of the obligation of any contract.

2. The enforcement of this order will not result in the taking of any property without due process of law.

3. The enforcement of this order will not result in the denial to any persons of the equal protection of the laws, and the Supreme Court of California has not, unlawfully or otherwise, refused upon the question of discrimination to accord to these plaintiffs a proper judicial review of the Railroad Commission's decision.

I.

THE ENFORCEMENT OF THIS ORDER WILL NOT RESULT IN IMPAIRMENT OF THE OBLIGATION OF ANY CONTRACT.

The contracts here in question were freely entered into by both their parties. To the public utility

they assured a market for its water, and an annual income of a specific minimum amount. To the consumer they assured the very real asset of continued and continuous water service upon his land. They contain a number of other provisions, regarding rights of way for ditches, and the like, in addition to the rate provisions mentioned above, and under these contracts rights and interests of paramount importance to both parties have vested during the years that have elapsed since their execution.

Plaintiffs admit that the Railroad Commission has the power to fix a rate for these consumers which will supersede the rates fixed in the contracts, and their bald assumption of an impairment of the obligation of such contracts merely because the Commission has thus fixed a new rate seems to us to be most unwarranted. In the case of *Hartland Law v. Railroad Commission,* supra, the California Supreme Court had before it a somewhat similar problem. The contract there in question fixed a rate for public utility steam and electric service, and gave the utility the right to use certain of the consumer's agencies and appliances. The Commission established a rate for the type of service covered by the contract, and Law complained of the order in so far as it might affect his contract rights. This contention was brushed aside by the State Court. It is too late, said that tribunal, to argue that the state may not fix rates for public utility service which will supersede those set forth in private contracts, without impairing the obligation thereof. But as to the other provisions of the contract, said the Court, in view of this rate change

it might be that the consideration or compensation would be nullified, in which event the consumer might have the right to claim a rescission of his contract,—a matter which necessarily could not, in such a case be determined by the administrative commission, but is primarily a question for the courts.

Thus, in the present case, the order of the Commission has established rates which unquestionably supersede the rates fixed in these contracts. But these agreements contain much that is beneficial and valuable to the contract holder aside from their rate provisions. To say, therefore, that the mere exercise of the rate-making function by the Railroad Commission has *ipso facto* and without more rendered these contracts null and void, and has rendered all these other provisions of no further force or effect, seems to us not only wholly unwarranted but also illogical and unreasonable. It is obvious that while such action by the regulatory body may or may not give the consumer a right to claim a rescission of the contract in its other particulars, the determination of that right, as well as its nature and extent, may only be made after some conscious and willing act of rescission on the part of the individual contract holder.

Plaintiffs have all along taken a position much akin to that of the child who wants to eat its cake and have it too. In one breath they say—"As to everything to occur in the future, these contracts are utterly and entirely superseded," but at the same time they declare that "All the rights which may have vested under these contracts up to the present time remain in force and are unaffected." We submit

that the mere statement of such a position carries with it its own refutation. Either these contracts—aside from their rate provisions—subsist or they do not subsist. They cannot be split asunder; they cannot be torn apart. True, the change in the rate *may* have given rise to a right to rescind for failure of consideration, or otherwise, but that point is not at issue here and cannot be determined in this case. If any consumer claims such a rescission, he should do so in some proper manner under the law of the State. We submit that the fact of such a claim is not pertinent herein, for if a right of rescission exists it is a matter occurring after and arising out of the decision the validity of which is here questioned. And the right of rescission itself is not determinable herein, for its existence depends upon many facts and factors which are not now before this Court upon the present record.

These consumers have made no move to rescind their contracts. This present action is merely an attack on the Commission's order—which may or may not have given foundation to the right to rescind. Until there has been a lawful rescission of these contracts, or some of them, under the doctrine announced in the case of *Law v. Railroad Commission,* supra, we submit that the Railroad Commission is not, as a matter of law, compelled either to deny and disregard the contract right of these very plaintiffs to the permament service and dedication of water upon their lands, or to deny and disregard the contract right of the Company to measure its annual water rates against these contract lands upon the basis set forth and

agreed upon in these contracts. We therefore submit that this proceeding is clearly not a proper one for the presentation of these claims, and that they are both premature and extraneous to the point at issue here.

In view of all the other provisions of these contracts, by some of which provisions definite and valuable rights have been given to the contract holders, this Honorable Court clearly cannot *presume* that every contract holder will desire to give up all these rights and to claim a rescission. These plaintiffs do not, nor do they claim to represent all the contract holding consumers under this system. Yet these rights may be of great value and benefit to some of such consumers. We argued below, and the State Court agreed, that the right to assured and continuous water service upon his land was a valuable right which the wise contract holder might well desire to retain, and that this rate change has not *ipso facto* brought this right to an end.[5] The State Court had

(5) In its first opinion the California Supreme Court declared upon this point:

"The Contracts of these petitioners as to some of these provisions have obviously not been abrogated by the orders of the Commission thus far made; as, for example, the provision therein that the water rights thus conveyed are appurtenant to and run with the land." (Transcript of Record, p. 85.)

And in its second opinion, which reversed the first, and is now here in question, it was said:

"With respect to the provisions in the contracts that the holders thereof should pay water rates according to the acreage of each individual tract, whether the same was irrigated or not, the Commission made no order or ruling which would have the effect of superseding or abrogating said contracts in that respect." (Transcript of Record, p. 136.) And again, "The point we seek to make is that said water contracts are a thing of value and were of sufficient importance to receive the attention and consideration of the Commission in making the classification it did make. * * *" (Transcript of Record, p. 140), and, "Whether or not petitioners used upon their lands the full amount of water which they bound themselves to pay for, it was the duty of the Canal Company, nevertheless, to hold itself in readiness to

long before held such a right to be in the nature of an easement, constituting a continuing burden or servitude upon the Company's water, water rights and system in favor of the land to which the water was by the contract made "appurtenant" (*Palermo L. & W. Co. v. Railroad Commission, supra*) and, in fact, to be in the nature of a grant of real property. (*Stanislaus Water Co. v. Bachman,* 152 Cal. 716.) A continuing and vested "dedication" of service to such lands is thereby set up, and the water company must hold itself in readiness to serve such lands, and all of them, at any time. To hold that all these rights have suddenly vanished into thin air merely because the Commission has exercised its undoubted power to fix a new rate would, we submit, be both unlawful and insuperable, and would be a real and a vital deprivation of the Constitutional rights of every contract consumer who might not desire to rescind his contract.

Suppose, for example, that some one of these contract holders should take that position as to the residuum of his contract. Is he now to be told that merely because the Commission has increased the rate, all the other rights which he obtained under his contract have suddenly been taken from him? Certainly, the Commission did not do nor desire to do this, nor do we believe it had the power so to do. And if any single contract holder could conceivably desire to retain his contract, we submit that to hold such

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supply the water required." (Transcript of Record, p. 141.) And particularly, "The rights conferred upon petitioners by said contracts are regarded by them as being of value is well shown by their unwillingness to concede that said contracts were in anywise annulled or abrogated by the Commission's action." (Transcript of Record, p. 141.)

contract *ipso facto* superseded by this order of the Railroad Commission would indeed be subversive of the constitutional rights of such contract holder.

If these plaintiffs now, in fact, possess the right to rescind their contracts, and if they in fact desire to rescind, let them do so in some proper manner. The Courts may then with propriety determine their status and their rights. But until this be done, we submit that the issue cannot properly arise either in this or any other Court, and until this be done, we further submit that no constitutional right of these plaintiffs has been invaded, and particularly that the obligation of these contracts has not in any conceivable manner been impaired.

II.

THE ENFORCEMENT OF THIS ORDER WILL NOT RESULT IN THE TAKING OF ANY PROPERTY WITHOUT DUE PROCESS OF LAW.

Plaintiffs attempt to invoke the due process of law clause of the Federal Constitution by claiming that the Commission, by its order now in question, has somehow unlawfully fastened upon their lands new and uncontemplated liens not covered by their contracts. We can find no logical reconciliation of this theory with their other proposition—which they utter in the same breath—that the Commission's order *ipso facto*, and without more has put an end to all the provisions of these contracts relating to rates and the method of their payment. Nor can we find the slightest basis for the idea that the Commission has

attempted to do this thing. The decision of the Commission contains no provision setting up or attempting to set up such liens. The Commission never claimed the power to do this, and we respectfully submit that there is nothing in the State Court's decision which would lend even the slightest color to this bald assumption. If, as a matter of law, such a lien exists, it can only be enforced in some proper state tribunal. Certainly this case presents no attempt to do this, nor could it, in the nature of things.

Plaintiffs talk boldly of "the lien adjudged by the Supreme Court of California" (Transcript of Record, p. 61), and declare that as to the fact of such a lien "the adjudication was made in the judgment under review." (Transcript of Record, p. 63.) Yet the sole basis for this theory is a statement of the State Court made in the course of a discussion of the advantages which had accrued to the contract holders from these contracts in connection with its justification of the discrimination in rates which the Commission had made in favor of the contract holders (including these very plaintiffs), and which it held to be lawful. The Court said:

> "It is true that any sums which *became* due for water service *became* a lien upon the lands and might be foreclosed as such, but this provision was a part of a contract freely entered into." (Transcript of Record, p. 140.) (Italics ours.)

How far removed is this statement of historical fact, however, from that which plaintiffs are attempting to read into the State Court's decision! That

Court did not declare that the Railroad Commission had, by its order, created some new lien upon these plaintiffs' lands. It did not say that such a lien arose by implication. It did not even suggest the existence of such a lien. All it said was that, alongside the many advantages which accrued to the contract holders from these agreements, there was a provision by which a lien was to vest in the Company for any sums which became due for water service.

This was clearly neither an adjudication of, nor even a statement regarding, any alleged lien under the new rates. It was simply a statement of historical fact, and in the absence of more tangible background for their assumption we cannot feel otherwise than that these plaintiffs have set up a straw man. No constitutional or other "Federal Question" can arise from such a set of facts. It is conceivable that any order *might* be attempted to be unconstitutionally enforced, but the decisions of the Railroad Commission are entitled at least to the ordinary presumption that they will not be so enforced.

As we have said above, this is not an action to enforce a lien. Even if the Canal Company desires to attempt to do this, it cannot do it here or in the present case. It will have to do so in the proper State Court, and these plaintiffs will then have every opportunity to appear and defend upon any ground they may select. But as far as the present case goes this talk of liens is wholly immaterial and premature. Such a contention, in our opinion, ignores the single issue properly cognizable herein, i. e. whether or not

the order fixing rates to be charged by this utility offends the law,—and we respectfully submit that this Honorable Court will not allow its bar to be made the forum for the determination of a mere moot question.

III.

THE ENFORCEMENT OF THIS ORDER WILL NOT RESULT IN THE DENIAL TO ANY PERSON OF THE EQUAL PROTECTION OF THE LAWS, AND THE SUPREME COURT OF CALIFORNIA HAS NOT, UNLAWFULLY OR OTHERWISE, REFUSED UPON THE QUESTION OF DISCRIMINATION TO ACCORD TO THESE PLAINTIFFS A PROPER JUDICIAL REVIEW OF THE RAILROAD COMMISSION'S DECISION.

In so far as plaintiffs claim that they are denied the equal protection of the laws because of the imposition of alleged liens upon their lands we respectfully refer the Court to our discussion under the heading of due process. We there showed that there was no attempt either on the part of the Railroad Commission or of the State Supreme Court to create such liens, and that, in any event, the question of the existence thereof is not properly within the issues of this case, and at this time is purely moot.

In so far, however, as plaintiffs urge a denial of the equal protection of the laws because of some allegedly unjust discrimination against them, we must bring to the Court's attention certain further considerations. The contention is, in brief, that plaintiffs are being discriminated against because they are to pay the annual flat rate per acre upon all the acres covered by their contracts, whereas—so they allege—

the non-contract consumer is to pay only upon land which he actually irrigates. This assumption is itself erroneous, for the non-contract consumer must pay his rate upon all the acreage included in his application, which must be made to the Company on or before January first of any year, irrespective of the exact acreage which he may actually irrigate during the season, and if he gives no notice of discontinuance he continues to be charged upon this same basis from year to year. Moreover, as we have stated above, the rates to contract holders, were fixed materially lower than those established for similar service to non-contract consumers.

Analyzing the situation, we find that under no possible theory could there be urged any discrimination against the contract holding consumer who desires to irrigate all of his acreage. To be sure, he will pay a rate greater than that fixed in his contract, but he does not complain of this, and since it will be a rate materially lower than his non-contract holding neighbor, he is not only not unjustly discriminated against, but is the recipient of apparently preferential treatment. The Commission and the Court below found that such apparently preferential treatment is, however, proper and justified, both because of the relative permanency of his use of water and because of the initial payment which he made to obtain his contract.

When, therefore, does this alleged discrimination begin? We suppose that, if plaintiffs are of a mathematical turn of mind, they will say that it begins, in the case of any contract holding consumer, when the amount of his land actually irrigated during any

particular season is such a small proportion of the land covered by his contract that the total amount which he will pay, divided by the number of acres actually irrigated, results in a greater payment per irrigated acre than the non-contract consumer would pay per acre under the rates fixed by the Commission.

And, as the acreage which the contract holding consumer actually irrigates might vary from year to year, the alleged discrimination would likewise vary. One year the situation as to the particular consumer might be highly preferential and the next allegedly discriminatory.

Whether any discrimination exists is, therefore, a purely subjective matter, variable entirely at the will of the consumer. It is an individual proposition. There is no evidence in this record to show what proportion of the lands under their contracts these plaintiffs are in the habit of irrigating. Nor is there any showing in this record from which the Commission or the Court could determine to what extent any of these plaintiffs fall within the category as to which the alleged discriminatory situation would exist. All that plaintiffs do is to argue that some of them *might* at some time not desire to irrigate all the land under their contracts. As the California Supreme Court said:

> "Petitioners (the present plaintiffs) impliedly, if not expressly, admit that if contract holders had exercised their full rights and irrigated each acre of their lands without exception the objection based upon unlawful discrimination would be removed. If, indeed, the number of acres which a consumer should choose to irrigate rather

> than the number upon which he contracted to pay a water rate is the criterion by which unlawful discrimination is to be determined, then the failure or refusal of a *non-contract holder* to irrigate in any one year a single acre included in the total acreage designated in his annual application would bring about the very result petitioners complain of. By such a rule one would be excused from performing what he agrees to do and may do that which it pleases him to do, a basis too shifting to predicate unlawful discrimination upon." (Transcript of Record, p. 138.) (Italics ours.)

In our opinion there could be no more complete or logical answer to plaintiffs' contentions. But the State Court went further. Unlawful discrimination is the child of illogical or intrinsically faulty classification of consumers, and the Court, in discussing that problem declared,

> "That there is a logical and natural ground for the classification made by the Railroad Commission seems convincing." (Transcript of Record, pp. 139-140.)

The Court then considered various reasons why the contract holders were properly classifiable in a different category from the other consumers of this utility, and concluded that the Commission had properly balanced the equities between the several groups of consumers before it, saying,

> "The point we seek to make is that said water contracts are a thing of value and were of sufficient importance to receive the attention and consideration of the Commission in making the classification which it did make even though said contracts must yield to the exigencies of great public necessity." (Transcript of Record, p. 140.)

This is particularly true since, as the Court further declared,

> "Whether or not petitioners used upon their lands the full amount of water which they bound themselves to pay for, it was the duty of the Canal Company, nevertheless, to hold itself in readiness to supply the water when required." (Transcript of Record, p. 141.)

As the California Court states, not all discriminations or differences in rates are unlawful, but a discrimination based on reason and justice can properly exist (citing *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184; 57 L. Ed. 1446), and in the present instance, said the Court,

> "We find nothing in the record by way of evidence which shows or tends to show that the classification made by the Commission in dealing with a complex situation was either unfair or unreasonable as to the members of either class of consumers. On the contrary, there is much to show that the entire effort of the Commission was to compose and equalize an inharmonious situation brought about by various causes" (Transcript of Record, pp. 141-2), and concluding: "The Railroad Commission undoubtedly had jurisdiction to make the order under review. Its classification for the purpose of rate fixing was a legitimate exercise of its power. As a matter of law it cannot be said that it was arbitrary or unreasonable." (Transcript of Record, p. 142.)

In spite of these declarations and findings of the State Court, made after a complete consideration of the entire record which had been made before the Railroad Commission, plaintiffs assert that some of their Constitutional rights have been violated because

the Court further stated that in any event it did not have authority to review the determination of the Commission upon the question of discrimination. We firmly believe this latter statement to be correct, for the reasons set forth in the Court's opinion, but however that may be, plaintiffs may not now complain on constitutional grounds since the Court has, as a matter of fact, awarded them precisely the judicial review for which they contend. This is not the type of case which this Court had before it in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287; 63 L. Ed. 909, where a utility claimed confiscation upon the ground of allegedly improper valuation methods, for here it is a consumer complaining of the difference between a rate applied to him and a rate applied to another—a matter which may or may not be unlawful, and which depends primarily upon complex questions of fact and opinion, for the determination of which the regulatory body is peculiarly and primarily fitted.[6]

As the State Court has clearly shown, the classification here involved was based upon a careful consideration of all relevant evidence. We submit, therefore, that under general legal principles, as well as under the Constitution and Statutes of California, the Commission's finding of fact should be held final and conclusive. But if any question shall present itself

(6) See, for example, the case of *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 588; 59 L. ed. 735. In this case in dealing with this very power of classification and discrimination, this court said: "As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the Legislature, or its administrative agent, as to matters within its province." (Citing cases.)

in the mind of the Court as to this, the result must here be the same, since plaintiffs have, in fact, had the full judicial review for which they contend.

* * * * * * *

We cannot close this brief without adverting to a practical matter which, we believe, clearly demonstrates that, irrespective of any possible intrinsic validity, this is not the proper time nor place for plaintiffs' present contentions, for under no theory could they in this action obtain the result which they seek. It must be recalled that their prayer in the State Court was for that Court to annul the Railroad Commission's order "in so far as the same makes provision for the collection of rates upon any acreage other than that upon which water may be desired by these petitioners." (Transcript of Record, p. 12.) Necessarily, therefore, if this Court should direct a reversal of the State Court's order it must do so upon the ground that that Court erred in not thus annulling the Commission's order *in part*.

The jurisdiction of the State Court to review the orders of the Railroad Commission is, however, limited by statute to an affirmance or annullment of the Commission's orders *in toto*.[7] It may not change

(7) "Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the Supreme Court of the State for a Writ of Certiorari or review (hereinafter referred to as a Writ of Review) for the purpose of having the lawfulness of the original order or decision on rehearing inquired into and determined. The review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. * * * *Upon the hearing the Supreme Court shall enter*

or correct such orders, nor may it annul them in part only. In the present instance the State Court was *not asked to do more than to annul this order in part,* and it obviously could hardly have gone ahead and annulled the order *in toto,* since it is neither charged with the duty nor vested with the power of reviewing orders of the Commission on its own initiative, apart from actual review proceedings, and apart from or in addition to the prayer made by the petitioner before it. In the present instance, we submit, the State Court might well have dismissed this petition for want of jurisdiction to make the particular order asked, in which event this Honorable Court could not, under any theory, have reversed its decision. The fact that it did not do this, but instead went on and considered and affirmed the Commission's order cannot, we submit, give rise to any greater or different rights in these plaintiffs.

In any event, it seems evident that the practical result of a reversal of the State Court's decision could only be an order of that Court annulling the Commission's order *in toto,* in so far as it affects these petitioners. But that would not accomplish what they desire; it would only bring back into force as to them the old rates, against the increase of which —as such—they do not complain, these rates being

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judgment either affirming or setting aside the order or decision of the commission. * * * No court of this state (except the Supreme Court *to the extent herein specified*) shall have jurisdiction to review, reverse, correct or annul any order or decision or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *provided,* that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases". (Public Utilities Act, Stats. 1915, p. 115, Section 67. Italics ours.)

unquestionably collectible from them upon the basis of all the acres covered in their contracts.

Nothing, we submit, could more clearly demonstrate that, there is no merit in plaintiffs' contention and that this is not the proper proceeding for their determination.

We therefore respectfully submit that this Writ of Error should be dismissed, and that the California Supreme Court's ruling should be affirmed.

Dated, San Francisco,
September 28, 1925.

CARL I. WHEAT,
Attorney for Defendant in Error, Railroad Commission of the State of California.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of September, 1925.*

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Attorneys for Plaintiffs in Error.

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Attorneys for Defendant in Error,
Sutter-Butte Canal Company.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1925

No. 73

Office Supreme Court, U.
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LIVE OAK WATER USERS' ASSOCIATION, BUTTE COUNTY FARM BUREAU, SUTTER COUNTY FARM BUREAU, et al.,
Plaintiffs in Error,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and SUTTER BUTTE CANAL COMPANY,
Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR, SUTTER BUTTE CANAL COMPANY.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1925

No. 73

LIVE OAK WATER USERS' ASSOCIATION, BUTTE COUNTY FARM BUREAU, SUTTER COUNTY FARM BUREAU, et al.,
Plaintiffs in Error,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA and SUTTER BUTTE CANAL COMPANY,
Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR, SUTTER BUTTE CANAL COMPANY.

This case grows out of an order of the Railroad Commission of the State of California, respecting the annual water rates to be paid to the Sutter Butte Canal Company by its water consumers for irrigation purposes, and of a decision of the Supreme Court of the State of California upholding the order.

The Sutter Butte Canal Company is a public utility water company doing business in Butte and Sutter Counties in that State, and the Railroad Commission is the body authorized to control and regulate public utilities within that State, and to fix their rates. This authority of the Railroad Commission has existed since the year 1911, but so far as the water rates of the Sutter Butte Canal Company is concerned, no order on that subject was made by the Railroad Commission until March 25, 1918.

SUMMARY OF PROCEEDINGS BEFORE RAILROAD COMMISSION AND IN SUPREME COURT OF CALIFORNIA, AND MATTERS INVOLVED THEREIN.

Prior to that date proceedings were instituted before the Railroad Commission by a number of water users of the Sutter Butte Canal Company involving its rates, rules, regulations and practices. There was heard with these proceedings an application of the Sutter Butte Canal Company in which it was alleged, in effect, that its rates and charges did not produce a sufficient sum to return to it the necessary annual expenses, depreciation and interest, and the Railroad Commission was asked to establish just and remunerative rates. (Transcript of Record, pp. 38-40.) The proceedings and application here referred to culminated in a decision and order of the Railroad Commission on March 25, 1918, designated as Decision No. 5227. The pertinent parts thereof are set forth in the Transcript, pages 38 to 52.

The Sutter Butte Canal Company is the successor of the Butte County Canal Company, which also was

a public utility water company. (Transcript, p. 5.) It acquired the property of the Butte County Canal Company in 1911, and assumed the obligations of the latter under the hereinafter mentioned contracts issued by it, and has operated, extended and enlarged the system since that date. Water is furnished by the Sutter Butte Canal Company for the irrigation of many thousands of acres of land, part of which is devoted to the production of fruit trees, vines, alfalfa, etc., and a larger part to the production of rice. The water rates were those set out in so-called water right contracts. There were six forms of such contracts in existence. The earliest of them were issued by the Butte County Canal Company, that is, during the years 1904 to 1911, and those made after that Company transferred its property to the Sutter Butte Canal Company were, of course, issued by the latter. The material provisions of the contracts are, with some unimportant variations, as follows:

The canal company agrees to furnish water at the rate of one cubic foot per second for each 160 acres of land described in each contract, for the purpose of irrigating the land. In cases where water is used for producing rice, the contracts provide for the furnishing of water at the rate of three cubic feet per second for each 160 acres of land. (Transcript, p. 57.)

The water covered by the contract shall be and become appurtenant to the land therein described, and can only be conveyed by and with a conveyance of the land, and all the covenants and conditions of the contract shall run with the land. Use of the water must be confined to said land.

The landowner agrees to construct and maintain a ditch extending from the canal company's ditch to his land, and agrees that the ditch may, at the option of the canal company be taken over, enlarged and operated by it, provided such use does not interfere with the delivery of water to said land.

The landowner grants to the canal company a right of way through the land and right of entry thereon.

The landowner agrees in consideration of the construction of the main canal, and ditch rights and delivery of water, to pay annually to the canal company on September 1 of each and every year thereafter, the sum specified in the contract, that is, at a specified annual rate per acre, the first annual payment to be made on the first day of September of the year in which the water is delivered by the canal company at the gate, or place of delivery, mentioned in the contract.

All sums due or to become due to the canal company under the contract shall be and become a lien on the lands described therein and may be foreclosed as any other lien.

The contract binds the heirs, successors and assigns of the respective parties forever, and recites that it is entered into "for and in consideration of the mutual covenants and considerations herein set forth." (Transcript, p. 52.)

In case of shortage of water each landowner is to be entitled only to a proportional share of the water available.

Declaration is made that it is understood that the

canal company will contract for the delivery of 1000 cubic feet of water per second. (Transcript, p. 53.)

The annual rate per acre provided in the contracts to be paid to the canal company was not uniform. In some contracts the annual rate was $1 per acre, in some $1.50 per acre, and in some $2 per acre. The $1 and $1.50 per acre annual rates appear in the earlier contracts issued by Butte County Canal Company. The $2 per acre annual rate is uniformly fixed in the contracts issued by the Sutter Butte Canal Company. (Transcript, p. 42.) The rates here mentioned are for water agreed to be furnished for crops other than rice. The rice-growing industry began in 1911, and as more water is required to produce rice than is required to produce other crops, an additional charge of $3 per acre per year in the years only when water was used by a landowner for the production of rice, was made by the Sutter Butte Canal Company. The situation then presented to the Railroad Commission was that some of the contract holders (not raising rice) were charged and paid only $1 per acre per year to the Sutter Butte Canal Company, some $1.50 per acre per year, and some $2 per acre per year, and that among the contract holders raising rice, some were charged and paid $4.50 per acre to the company for the water furnished for the production of that character of crop, and some paid $5 per acre. The outstanding contracts alone did not produce this situation. Some contract holders had to pump to their land the water delivered by the company at the land, and an allowance of 50 cents per acre was made by the company in such cases on account of the pumping ex-

pense incurred by those contract holders. Some contract holders also received their water through ditches owned by Gridley Land & Irrigation Company, and a reduction of 50 cents per acre in the water rates payable to the Sutter Butte Canal Company was made in such cases by those using these ditches.

In January, 1916, the Railroad Commission permitted the Sutter Butte Canal Company to specially contract to furnish water for one or more years, at the option of the consumer, for the production of rice, and to charge $7 per acre per year therefor. This type of contract is called the short-term form of contract (Transcript, pp. 42-3), by way of distinguishing it from the types of continuous contract mentioned above. The short-term form of contract does not play any part in the controversy before this Court.

As part of the consideration for the execution of the continuous types of contract, the Butte County Canal Company required each landowner with whom such contracts were entered into, to pay, in addition to the annual rates per acre, the sum of $5, or $6, or $10 per acre of the land covered by the contract, "for water right or initial payment," either at the time of the execution of the contract, or in ten annual installments of 50 cents per acre. (Transcript, p. 42.) The latter method of payment of that charge was provided for in the earliest contracts issued by the Butte County Canal Company. The Sutter Butte Canal Company required each new consumer to whom it issued its continuous contracts for the furnishing of water, to pay a uniform initial charge of $10 per acre of the land described in the contract.

That company also required each holder of a contract for the continuous furnishing of water to pay the annual water rate specified in the contract, computed on the basis of the area of the land described in the contract, irrespective of the extent to which the water agreed to be furnished may or may not have been used by the contract holder. The rates here referred to were the rates for water for crops other than rice. The additional charge of $3 per acre for water for rice crops was only made when water for rice crops was specially ordered by a holder of a contract for the continuous furnishing of water.

There was no provision in any of the contracts giving the holder thereof any right or option to lessen or temporarily cut off for any year or years his obligation to pay annually the rate specified in the contract because he might desire to irrigate only part of the land described in the contract, or might desire not to irrigate any of it in any year or series of years, except only that there was a right given in a number of the contracts issued by the Sutter Butte Canal Company for the contract holder to call, at his option, for water for the production of rice. If he called for it the $5 per acre rate applied. If he did not call for it, the $2 per acre contract rate applied. The contrary statement appearing in the petition for rehearing by the Railroad Commission presented on behalf of plaintiffs in error (Transcript, p. 31), to the effect that the Sutter Butte Canal Company or its predecessor had agreed to "supply to the contract holder such amount of water not exceeding a certain quantity per acre for his entire holding each year as might be re-

quired by the contract holder for irrigation of so much of his land as he might in any one year desire to irrigate", is incorrect, and, doubtless, was made inadvertently. In the opening paragraph under heading "Summary", pages 31-2 of the brief for plaintiffs in error filed in this Court, it is shown that the contract-holding consumers had no such option.

In the above mentioned proceedings instituted before the Railroad Commission, complaint was made respecting the want of uniformity of the annual water rates fixed in the outstanding contracts, and the practice of the Sutter Butte Canal Company of requiring new consumers, other than those coming in under the short-term form of contract, to enter into contracts for the continuous furnishing of water, and to pay the $10 per acre initial payment, and also respecting the practice of that company of computing and charging the annual rates for water on the basis of the area of land described in each contract, regardless of whether the water agreed to be furnished was actually used or not by the contract holder.

The Railroad Commission found that the gross revenue of the Sutter Butte Canal Company was insufficient to meet the maintenance and operating expenses of the company, and the amount fixed for depreciation, and to provide a return of 8% on the valuation of the company's system, and accordingly, in its order of March 25, 1918, the Railroad Commission established annual water rates which it deemed to be sufficient to meet the maintenance and operating expenses of the company and the amount fixed and

allowed for depreciation, and to provide a return of 8% on the valuation of the system.

. In this order the Railroad Commission established three rate schedules. (Transcript, p. 51.) The first schedule is called the flat rate schedule, that is, the schedule of rates for water not measured by meter or other device. The second schedule is called the measured rate schedule, that is, the schedule of rates for water measured by meter or other device. The third schedule is called the initial payment rates schedule. In this schedule the rates for water are materially lower than the rates in the first and second schedules. The flat rates in the third schedule were but a continuation of the rates fixed in the contracts which had been issued by the Sutter Butte Canal Company, that is, $2 per acre per year, plus $3 per acre for water used for the production of rice. That schedule was established for the benefit of the contract holders in consideration of the fact that they had "paid the so-called water right or initial charge", which the Commission regarded as "advance payments on rates", and it was deemed to be proper that new consumers who would make an initial payment of $10 per acre should be put on an equality with those who had theretofore paid the water right or initial charge. (Transcript, pp. 49-50.)

As to new consumers generally, the Railroad Commission in its order of March 25, 1918, directed the Sutter Butte Canal Company to file and put into effect revised rules and regulations to conform to certain rules established by the Commission and applicable generally to water, gas, electric and telephone utilities.

(Transcript, pp. 47, 52-3.) In these general rules there is one to the effect that such utilities may not, except in certain cases not material here, require an applicant for service to sign a contract for service as a condition precedent to getting service, but may require written application for service to be made. The Sutter Butte Canal Company filed its revised rules and regulations pursuant to the direction of the Railroad Commission and the same were approved by the Commission and went into effect on April 30, 1919. (Transcript, p. 53.) These revised rules and regulations contain the following provisions:

> "1. Applications for water must be made on the printed forms of the Company and filed with the Company not later than January first of the year in which service is desired, except that in case it is necessary to construct, extend or enlarge any ditch in order to serve, application must be made on or before October first preceding the year in which service is desired." * * *
>
> "2. Consumers must notify the Company in writing before the above mentioned dates if service is to be discontinued for the following irrigation season. The consumer will be charged and shall pay at the regular rate until such notice is received. *The foregoing as to discontinuance of service does not apply to holders of contracts for continuous furnishing of water.*"
>
> "4. Payment for service under the schedule of flat rates and the minimum payments of the measured rate schedule are due and payable as provided above and before service is rendered. If not paid as provided, the Company may discontinue service after thirty days' written notice. Service will not be restored until the amount due is paid, together with interest at the rate of 8% per annum, and credit is established as herein provided."

"17. Water must be used only on the area described in the application. For violation of this rule, water will be turned off and service will not be restored until payment is made at the established rates for the area described in application, plus other areas irrigated."

The form of application referred to in Rule 1, and put in use pursuant to the order of the Railroad Commission, reads as follows (Transcript, pp. 34-5):

"To Sutter Butte Canal Co.:

The undersigned applicant..... hereby request..... you to furnish water for the irrigation of the following described land in..... County, State of California, to-wit:....., containing.....acres.

The applicant..... desire..... to use the water for the irrigation of said land as follows (State kind of crop):

.....acres of.....
.....acres of.....
.....acres of.....
.....acres of.....

The applicant..... agree..... to pay for said water in accordance with your established rates for said service specified in Schedule.....; payment to be made in installments at the times prescribed in your established rules and regulations on file with the Railroad Commission of the State of California.

The applicant..... agree..... to comply with said rules and regulations.

Dated..... ....., 19.....

...., Applicant.

Sutter-Butte Canal Co. accepts the foregoing application.

Dated..... ....., 19.....

SUTTER BUTTE CANAL CO.,
by..... ....."

The concluding sentence in Rule 2, viz: "The foregoing as to discontinuance of service does not apply to holders of contracts for continuous furnishing of water," refers to the consumers who hold the outstanding contracts referred to above. (Transcript, p. 57.)

The Railroad Commission directed, and it was accordingly provided in the rules and regulations of the Sutter Butte Canal Company, that payment of part of the water rates should accompany an application for water, and that the remainder of the rates should be paid in two installments, one on or before February 1, and the other on or before July 1 of the first year, and that in subsequent years during the continuance of service the rates should be paid in two specified installments on or before February 1 and July 1 of each of the subsequent years.

The irrigation season in the territory served by the Sutter Butte Canal Company commences around the latter part of April or in May of each year, and extends through the succeeding months of June, July and August, and into the months of September or October, and then ceases; that is to say, the Sutter Butte Canal Company commences to furnish and its consumers commence to use water for irrigation purposes in each year in the month of April or May, and the use thereof is discontinued in the succeeding September or October. (Transcript, pp. 57-8.)

One of the results of the order of the Railroad Commission of March 25, 1918, was the discontinuance of the practice of the Sutter Butte Canal Company

pursued up to that time of requiring new consumers generally to enter into contracts in the form and to the effect stated above, and to make an initial payment of $10 per acre upon the execution of such contracts.

Another result was that in addition to the holders of contracts for the continuous furnishing of water by the Sutter Butte Canal Company, there was created a class who have established their relation with that company as consumers of its water through the medium of applications. No such class of consumers existed prior to the order of March 25, 1918. For convenience of reference, those in this class are called the non-contract consumers, and those in the class who hold contracts for the continuous furnishing of water are called the contract-holding consumers. (Transcript, p. 57.)

The Sutter Butte Canal Company interpreted the decision and order of the Railroad Commission of March 25, 1918, to mean that it could continue to charge each of the contract-holding consumers $2 per acre per year computed upon the whole area of his land described in his contract, regardless of the extent to which the water agreed to be furnished by the company in the contract may or may not be used by the contract holder, with the right to charge him $5 per acre for water specially requested for the production of rice crops, payment of these charges to be made in two equal installments on or before February 1 and July 1, respectively, of each year; and the company continued to act accordingly as to these contract holders, and the company's charges were paid by the

contract holders (Transcript, p. 8), all with the knowledge of the Railroad Commission.

It also interpreted the decision and order to mean that the contract-holding consumers were distinguishable from the non-contract consumers in respect to the making of an application to establish the relation of consumer; that is, that the making of an application was appropriate only to those who had not already established the relation of consumer by virtue of the outstanding contracts; and the company acted accordingly in this respect, with the knowledge of the Railroad Commission.

These interpretations necessarily imply or presuppose that the rights and obligations of the parties to such contracts, so far, at least, as the duty of the company to furnish water annually in every irrigation season to the extent specified in the contract, and the duty of the contract holder to pay annually the established rates therefor, are concerned, remain in effect notwithstanding these rates may differ from those specified in the contracts.

The Sutter Butte Canal Company also interpreted the decision and order of the Railroad Commission to mean that as to each non-contract consumer the annual water rates payable by him were to be computed yearly in accordance with the area of his land definitely described in his application, regardless of the extent to which the water applied for may or may not be used by him, as long as he continues on from year to year under the same application; and the company acted accordingly in that respect, with the knowledge of the Railroad Commission.

Thus there was uniformity in the practice of the company in respect to the method of calculation of the annual water rates payable by the contract-holding consumers and by the non-contract consumers. The calculation in the one case was based upon the area of land described in the contract; the calculation in the other case was based upon the area of land definitely described in the application.

Another matter is stated here by way of clarification. In the petitions, briefs, etc., presented on behalf of plaintiffs in error in the various stages of this controversy, including the brief for plaintiffs in error filed in this Court, there appear statements to the effect that the Sutter Butte Canal Company, with the sanction of the Railroad Commission, charges the contract holders "for water not served or furnished by the Company," or charges the contract holders at rates based upon areas of land "to which no water is delivered," etc. All such statements are incorrect. They are doubtless intended to mean that charges are made for water which contract holders do not desire to use in the season in which it is held for their use by the canal company, and, as matter of fact, that is all that they can be taken to mean. It never was the practice of the canal company to charge for water not actually delivered to a consumer, or, in the case of a contract-holding consumer, not held ready for his use.

On November 5, 1921, the Sutter Butte Canal Company filed an application with the Railroad Commission setting forth that since the Commission's decision and order of March 25, 1918, the company had spent

large sums of money for additions to and betterments of its system; that its rates were insufficient to provide for the annual expenses of maintenance and operation, a reasonable allowance for depreciation, and a fair return on its investment; and asking for an increase of rates. In this proceeding appearance was made on behalf of the present plaintiffs in error, two of whom, Thresher and Coppernoll, are contract-holding consumers of the canal company. The other plaintiffs in error are unincorporated associations said to represent persons similarly situated to Thresher and Coppernoll, but the number and identity of the persons so represented was not disclosed.

The plaintiffs in error requested that the Railroad Commission formally declare whether it intended that the Sutter Butte Canal Company had the right under the Commission's decision and order of March 25, 1918, to require payments of water rates to be made for any land which was not to be irrigated but which was embraced in the land described in a pre-existing contract. It was contended that if the Railroad Commission did intend that the Sutter Butte Canal Company had that right, the Commission had no power to permit such a thing. It was conceded that the power to prescribe the rates at which water devoted to a public use shall be furnished is a necessary incident to the power of regulation of public utilities possessed by the State, and that any pre-existing contract must yield to this power (Transcript, pp. 69-70), but it was denied that the rates fixed in contracts of the character of those here involved could be changed and the contracts left otherwise untouched (Transcript, p.

71), and it was asserted that when the Railroad Commission exercised the power of changing the contract rates "the contracts are entirely superseded;" "the contracts have no further life." (Transcript, pp. 73, 79, 80.)

It was not shown, or, for that matter, stated, that any of the contract-holding consumers desired to discontinue absolutely, for all time, the use of water for the irrigation of their lands, and to disclaim or release all rights under their contracts. On the contrary, when questioned by counsel for the Sutter Butte Canal Company as to whether the rights of any of the contract-holding consumers could be regarded as having been so fully terminated by the action in 1918 of the Railroad Commission in increasing the rates fixed in the contracts, that the canal company was free to again dispose of to others the water agreed to be continuously furnished under the contracts, counsel for plaintiffs in error answered (Transcript pp. 79-80):

> "I have not contended for one minute, and shall not contend for one minute that the action of the Railroad Commission has invalidated or nullified anything which has been done in the past. * * * When * * * the predecessor of the present company was out trying to get enough money to build its first canal, and * * * it made promises to these people in view of the existing provisions of the Constitution, and if they then got the advance payment, * * * and if the other provisions of the contract made in view of the power of the State, and it formally dedicated a particular amount of water, preferentially, as Judge Shaw says, (in Butte County Water Users' Association v. Railroad Commission, 185 Cal. 218), to the particular land, that is

> the thing which is beyond the power of the Commission, or of any other tribunal to change. If these people paid to the Canal Company, prior to the action of the State on controlling rates, and preceding the contracts, anything, if they either suffer anything, or gain anything, those things remain; they were a part of the consideration for all the dealings, up to the time, the perfectly valid dealings, like all perfectly valid contracts which could not be nullified, but which are superseded at the time the State exerted its power * * * to control these rates for future dealings, and there is absolutely no difficulty in reading this decision (that of Judge Shaw) with that view of the law. * * * There is not one word in anything, I will state, that would suggest a nullification of these contracts. I have merely said that the contracts were absolutely valid up to the time the sovereign power of the State was exerted; when it was exerted the contracts were simply superseded, that is all there is to it; there is nothing to it."

The Sutter Butte Canal Company conceded that it was bound by the contracts to continuously furnish water to the contract holding consumers for the whole area of the lands described in the contracts as long as the contracts continue in effect, notwithstanding the Railroad Commission had changed the contract rates. (Transcript, pp. 78-9.)

In the proceeding last above referred to the Railroad Commission found that the Sutter Butte Canal Company was entitled to an increase of the rates established in 1918, and those rates were raised. Its decision and order in the second proceeding, designated as Decision No. 10372, was made on April 26, 1922, and will be found on pages 12 to 29 of the transcript. Speaking generally, the flat rate applic-

able to the contract-holding consumers was raised from $2 to $2.30 per acre per annum, and, where water is used for the production of rice, the flat rate was raised from $5 to $5.80 per acre per annum, and the flat rate applicable to the non-contract consumers was raised proportionately above the 1918 rates applicable to that class of consumers. In answer to the request that the Railroad Commission declare whether it had intended to recognize in the order of March 25, 1918, that the Sutter Butte Canal Company had the right to require payments of water rates to be made for any land which was not to be irrigated but which was embraced in the land described in a pre-existing contract, and in answer to the contention made on behalf of the plaintiffs in error that the Railroad Commission had no power to permit that to be done, the Railroad Commission said (Transcript, pp. 14-15):

> "Another group of consumers holding contracts similar to those just referred to take a totally different position and urge that as to them applicant is a public utility and the former action of the Commission, fixing rates different from those specified in their contracts, has resulted in the complete abrogation of these contracts in all particulars. We think this contention is also unsound. It is well settled in this state that contracts of this sort are subject to revision. To the extent that the rates for water are changed by the orders of the Railroad Commission these contracts are modified or reformed but not wholly superseded or abrogated. Other provisions of such contracts may remain in full force and effect.
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> Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 298.

The reason these consumers desire that their contracts be completely annulled is that the contracts contain a provision for continuous service of water for the entire acreage for which water was contracted irrespective of whether water is or is not actually used on the lands covered by the contracts. In other words, they are required by their contracts to pay a certain amount per acre per year even though part of the acreage may remain uncultivated, and no water used. Under these contracts, on the one hand the company must hold itself in readiness to serve the entire acreage covered by the contracts, and hence is not free to dispose of, to any one else, the water necessary to do this, and on the other hand the consumers are required to pay for the full acreage involved irrespective of whether the entire acreage be irrigated each year.

In this connection, it is urged that in the Decision of the Commission No. 5227, 15 O. & O., R. R. C. 425-450, the provision requiring payment for acreage on which water was not actually used was set aside. However, we think a reading of the entire opinion in that case will not bear out this contention. The order itself provided for three distinct classes of rates:

1. A flat rate for consumers not holding contracts.

2. A measured rate to apply where meters were installed.

3. A flat rate for holders of contracts.

The order clearly shows that the contract holders were treated as a separate class of consumers and the Commission deemed that, except as to the change in rates, the contracts remained in full force and effect.

If the entire system were metered, as has been recommended by the Commission, and all water was paid for on a measured basis, a situation might be presented which would justify the elimination of the annual acreage charge on unirri-

gated lands. Under present conditions, however, we believe that this charge is justified, and the Commission will not, therefore, prescribe a rate which will supersede this provision of the contract."

Plaintiffs in error asked for a rehearing by the Railroad Commission. (Transcript, pp. 29-33.) It was contended in the petition for rehearing, among other things, that the Railroad Commission had not correctly stated the position of the plaintiffs in error as to the legal effect of the fixing of rates upon the pre-existing contracts; that the Railroad Commission could not say that the Sutter Butte Canal Company was required, as matter of law, to hold itself in readiness to serve the entire acreage covered by the contracts; that it was beyond the power of the Railroad Commission to say that the contract-holding consumers were required to pay for water for their entire acreage, irrespective of whether the same be irrigated or not, "coupled with schedules fixed" by the Railroad Commission. The reasonableness of the new rates fixed was not questioned. What was and is questioned is, that the Sutter Butte Canal Company is allowed to charge the rates on the basis of the area of the land described in the contracts, and is not limited to charging the rates on the basis of the area of land which the contract holder chooses to irrigate, and is not prohibited from charging anything if the contract holder chooses not to irrigate his land at all.

In that portion of the petition for rehearing dealing with the contention that the Railroad Commission had not correctly stated the position of the plaintiffs in error as to the effect of the fixing of rates upon the

pre-existing contracts, it is said (Transcript, pp. 31-2):

"In and by Decision No. 5227 of this honorable Commission (the decision of March 25, 1918), according to the statements contained in Decision No. 10372 (the decision of April 26, 1922), the Commission fixed rates for water used in excess of the rates agreed upon by the parties under said contracts, *and did not set aside the provisions in said contracts requiring payment for acreage on which water was not actually used.* * * *

"It is not true, as stated in said Decision, that these petitioners contend, or ever have contended, that Decision No. 5227, fixing rates different from those specified in their contracts, resulted in the complete abrogation of the contracts *in all particulars.* In the brief filed on behalf of petitioners before Decision No. 10372 was rendered, it was said:

" 'None of these contracts when made was in violation of any existing law or regulation. The contracts were, and still are, entirely valid. In each contract for a consideration paid by the land owner or the land buyer he received either *his right to water* in addition to the land he owned or *his right to water* with the land he was buying, and, when the consideration was paid by him and the conveyance made to him, that portion of the valid contract became fully executed. The land owner or water right purchaser could not by reason of any action on the part of the State recover the consideration passed from him, nor could the company by reason of any such action rescind the contract or deed.' "

"When the State undertook to regulate the sale of the water publicly dedicated under the provisions of Section 1 of Article XIV of the Constitution of California, all provisions of the contracts concerning the rates to be charged and the service to be rendered were within the control of this honorable Commission as to water actually

used, or to be used, *and the existing contracts remained in full force and effect, except as the consideration therefor moving from or to either party was changed by the lawful exercise of the powers vested in the Railroad Commission.*"

The Railroad Commission denied the petition for rehearing (Transcript, pp. 33-4), and thereupon the matter was taken up to the Supreme Court of the State of California on writ of review. The petition for review by that Court is set forth in the transcript at pages 3 to 12. That Court was asked to annul and set aside the decision and order of the Railroad Commission made on April 26, 1922, "in so far as the same makes provision for the collection of rates upon any acreage other than that upon which water may be desired by these petitioners." (Transcript, p. 12.)

In the petition for review by the Supreme Court of California, in addition to the words just quoted, the following averments bearing upon the attitude of plaintiffs in error as to the extent to which it was claimed that the contracts were affected by the increase of rates, appear (Transcript, p. 11):

"It is not true and there is no evidence in the record that any of these petitioners contended or now contend that Decision No. 5227 (i. e., the decision of March 25, 1918,) resulted in the abrogation of their or any of their said contracts. These petitioners allege and in their said proceeding at all times maintained, and now maintain that each of said contracts was *and still is entirely legal*, and that when the State, by the agency of said Commission under Article XIV, Section 1 of the Constitution of California, undertook to fix rates for water service by the respondent Company, each of said contracts was as to further dealings between the parties superseded by the rates es-

tablished by the said Commission for water service by said Company."

The Supreme Court of California rendered an opinion on January 8, 1923, and made an order therein annulling the order of the Railroad Commission of April 26, 1922, "in so far as the same affects" the petitioners—plaintiffs in error here. This opinion is set forth in the transcript at pages 81 to 90. Dealing first with the question as to the authority of the Railroad Commission to change the contract rates, the Court said (Transcript, pp. 84-5):

> "As to the first of these contentions, it must be admitted by the petitioners herein as a necessary corollary to their concession to the effect that the Canal Company was at all times prior to and during the existence of their contracts a public utility, that the full authority invested in the state by the Constitution and by it reposed in the Railroad Commission to regulate rates, carried with it the power to change said contracts in so far as the proper exercise of the jurisdiction of the rate-making body might require such change. The contracts thus affected would be neither abrogated nor superseded as to the provisions thereof unaffected by such changes in their provisions as were necessary in the course of such rate regulation. *The contracts of these petitioners as to some of these provisions have obviously not been abrogated by the orders of the Commission thus far made;* as, for example, the provision therein that the water rights thus conveyed are appurtenant to and run with the land."

But the Court reached the conclusion that the Railroad Commission had not regularly or properly exercised its authority in this case because of an erroneous assumption by the Court that the Railroad Commission had sanctioned a discrimination, to the preju-

dice of the contract-holding consumers, in the matter of the calculation of the water rates of the Sutter Butte Canal Company against that class of consumers, and the calculation of the water rates against the non-contract consumers, and for that reason the Court annulled the order of the Railroad Commission "in so far as it affected" the plaintiffs in error. It was assumed by the Court that the Commission had in that order, as well as in the prior order of March 25, 1918, directed or intended that as to the contract-holding consumers the annual water rates should be calculated upon the total area of their land described in their respective contracts, regardless of the area actually irrigated, and that as to the non-contract consumers, the annual water rates should be calculated upon only the area of their respective holdings which was actually irrigated, regardless of the area described in their applications for water. This assumption runs throughout the opinion.

Petitions for rehearing by the Court were presented by the Railroad Commission and the Sutter Butte Canal Company, in which the Court's attention was called to the erroneous assumption above mentioned (Transcript, pp. 90-108), and thereafter on February 6, 1923, the Court vacated and set aside its decision of January 8, 1923, and granted a rehearing, and on September 21, 1923, it rendered its decision affirming the order of the Railroad Commission of April 26, 1922. This decision is set forth in the transcript on pages 135 to 142. It will be observed that the Court modified its former statement of the facts, and, among other changes, omitted the words appearing in the

first decision imputing to the Railroad Commission an intent on its part to allow a discrimination against the contract-holding consumers in the calculation of water rates in the respect stated in the first decision, and in place thereof it is said (Transcript, p. 136) that the contract-holding consumers were required to pay the rates applicable to them "upon the basis of the entire acreage of their respective holdings" covered by the contracts, and the non-contract consumers were required to pay the rates applicable to them "upon the total acreage designated in the application" of such consumer. The Court further said (Transcript, pp. 141-2):

> "Petitioners have shown no violation of the provisions of section 19 of the Public Utilities Act which provides that no public utility shall make or grant any preference or advantage to any corporation or person or subject any person or corporation to any prejudice or disadvantage or establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect as between classes of service. It will be noted that this section provides that the Commission shall have the power to determine any question of fact arising under said section. * * * No design has been shown on the part of anyone to give any person an unlawful preference or unfair advantage over another or to indulge in an unlawful discrimination in any manner whatsoever."

These statements, of course, constitute an admission that the Court had erred in assuming in its first decision that there was discrimination against the contract-holding consumers in respect to the basis of computation of water rates.

The conclusions reached in the second and final de-

cision of the Supreme Court of California, so far as rights of the plaintiffs in error under the Federal Constitution are concerned, are now asked to be reviewed by this Court.

AS TO THE LEGAL EFFECT OF THE CONTRACTS.

The following is a summary of the principal decisions of the Supreme Court of California respecting the legal effect of contracts of the character here involved:

In Stanislaus Water Company v. Bachman, 152 Cal. 716, the Supreme Court of California held that a contract for the continuous furnishing of water by a water company confers a right to receive water upon the terms agreed on, subject, in cases of dedication by the water company to public use, to regulation and control by the state, and is a right in real property; that this water right becomes an easement appurtenant to the land described in the contract and passes with the land by a conveyance thereof; that the right under the contract to have the water flow to the land for its irrigation, is a servitude upon the company's canal and connecting ditches, and is an appurtenance to the land, and is real property, The contract involved in that case was substantially the same as those involved here. The landowner agreed to pay a fixed annual rate for the water perpetually. The water company claimed the right to demand a higher rate for the water furnished, basing its claim upon the ground that it had acquired the water system, etc., under circumstances which freed it from the obligations of the contract involved. It was held that it

had acquired its property subject to the obligations of the contract, and could not demand any higher rate for the water furnished than that specified in the contract, unless and until the state, in the exercise of its power of regulation and control, permitted it to do so.

In Southern Pacific Company v. Spring Valley Water Company, 173 Cal. 291, an agreement was made whereby the railroad company granted to the water company the right to lay and maintain a line or lines of pipes for the carrying of water on and along certain land of the railroad company, in consideration of the construction and maintenance of a hydrant at Newark Station and the free use of water therefrom for fire and station and other railroad purposes. It was held that the agreement necessarily implied that the hydrant was to be constructed and maintained by the water company; that the railroad company was to have the free use therefrom of water flowing through the pipe line; that, in legal effect, there was a grant by the water company to the railroad company of a water right consisting of the right to take part of the water flowing in the conduit; that the water right was "a burden or servitude upon the pipe line and water system" of the water company, "a right to a part of its water"; that "upon the completion of the pipe and the running of water therein the respective agreements became executed, not executory;" that although the agreement did not specify how long the railroad company's right to the free use of the water was to continue, so long as the water company maintained the route given, the right of the

railroad company "was a burden or servitude thereon which entitled them to take and use water from the main to the quantity necessary for the purposes specified;" that the principle that a contract whereby one party agrees to supply a commodity, in the nature of personal property, to the other party, as required, at a fixed price, but for no specified period of time, may be terminated by either party after a reasonable time and upon reasonable notice, was not applicable "to a case like the present where * * * the contract creates an easement or servitude in real property and the supposed buying and selling of the water consists merely in the continued enjoyment of the easement."

In Palermo L. & W. Co. v. Railroad Commission, 173 Cal. 380, the company owned a tract of land and the right to divert water from a tributary of the Feather River. It constructed a system for conducting the water to this land for purposes of irrigation. It sold parts of the land, the conveyance in each case containing a provision for supplying water to the land. It refused to furnish water upon demand of one of the landowners. Thereupon application was made to the Railroad Commission for an order requiring the company to furnish the water. Such an order was made by the Commission, and on review thereof by the Supreme Court of California it was held that the Palermo Company was bound to furnish the water even though there had been no demand made therefor for part of the land involved for over twenty years after the agreement to furnish water had been made, and there had been a cessation of

demand for water for another part of the land for about the same number of years. In one of the deeds involved it was provided that "water shall be furnished if the grantee, his heirs or assigns, shall at any time plant trees or vines or otherwise cultivate said lands." It was contended that this agreement of the Palermo Company should be construed to mean that the land must be planted and cultivated within a reasonable time, and that the agreement was not to run in perpetuity. It was held that the agreement was not merely one to sell personal property in the future; that it was a present grant of a water right, which constituted a burden or servitude upon the water system of the grantor; that an easement acquired by grant is not lost by mere disuse, unless the vendor claims a forfeiture because of the non-use, or asserts it against the vendee by some hostile act, and the vendee allows his right to be then lost by operation of the statute of limitation; that mere failure to take and use the water for which he has, at the time, no need, will not forfeit the right to the vendor.

In Henrici v. South Feather Land etc. Co., 177 Cal. 442, the decision cites and follows Stanislaus Water Co. v. Bachman, supra. After noting certain variances in the terms of the agreements involved in the two cases, the Court said:

> "The real ground of decision (in Stanislaus Water Co. v. Bachman) was that the agreement to furnish water conferred upon the land owner a specific right or interest in real property, affecting the system of the Water Company."

In all of these cases the water companies involved were engaged in the business of furnishing water as

public utility water companies. The rights of the landowners arising under agreements made by such companies to furnish water have been held by the Supreme Court of California to exist similarly in cases where the agreement to furnish water was made by a water company whose water has not been devoted or dedicated to public use, except, of course, that in such cases the Railroad Commission has no power to change rates or to regulate or control the company.

Allen v. Railroad Commission, 179 Cal. 68, 73.

It is also declared in Allen v. Railroad Commission that the easement to receive water attached to the land of the contract holder and the servitude upon the source of supply and the distributing system of the water company "constitute a single entity and the one cannot be separated from the other without destroying both."

Butte County Water Users Association v. Railroad Commission, 185 Cal. 218, concerned the rights of the contract-holding consumers of the Sutter Butte Canal Company, or old consumers, as they are called by the Court, and the rights of new and later consumers of that company in respect to the distribution to them of the water available for that purpose in case of a shortage of supply. The new consumers were taken on at a time when there was no reason to anticipate a shortage of water; their lands were situated in the territory which the canal company had originally undertaken to supply with water; and in a year of normal supply the amount of water available for diversion and distribution by the canal company

would be adequate for the old as well as the new consumers. When later on, in the year 1920, it was feared there might be a shortage of supply, the contract-holding consumers made application to the Railroad Commission for an order directing the canal company not to supply any of the water to the new consumers until the needs of the contract-holding consumers had been taken care of. The Railroad Commission decided that the new consumers had the right to share in the water pro rata with the contract-holding consumers, or old consumers. On review by the Supreme Court of California, it was contended by the old consumers that they had a vested right to the water in preference to the new consumers, so that in case of a shortage the water is not to be prorated; that the old consumers can take all they require and the new consumers could get only what is left. The Court conceded (185 Cal. 224) that the right of a consumer taking water for irrigation of his lands "is a vested right of which he cannot be deprived by the diversion of waters to others" not consumers, but that as between consumers no one has a vested preference over another in times of a water shortage, excepting that there may be a preference in favor of that class of regular consumers who are entitled to share in the water ordinarily available, and that class of consumers termed "surplus consumers, that is, consumers whom the company undertakes to serve only when and as it has a surplus over and above the needs of its regular consumers." In a concurring opinion rendered by Judge Shaw, that learned jurist states that as the canal company had reserved in its

contracts the right to contract to supply at least 1000 cubic feet of water per second, and to prorate the supply in case it fell below that quantity, the canal company showed that it was its purpose that the lands covered by the contracts should constitute the territory to which this quantity of water should be dedicated, and he further states that "the land so described would be entitled to preference in such use and other lands could rightfully receive water only from the surplus remaining after the rightful users had taken the quantity they had respectively contracted for so far as it was required for beneficial uses on their lands."

On pages 40-41 of the brief for plaintiffs in error reference is made to Leavitt v. Lassen Irrigation Co., 157 Cal. 82. Emphasis is placed upon the statement in that case that a public service water company cannot confer upon a consumer a preferential right to the use of any part of its water. The claim involved in that case was substantially the same as that made by the contract-holding consumers in the Butte County Water Users Association case. Leavitt originally owned water rights and a water system. He claimed that he appropriated the water in part for the purpose of sale and distribution, and in part for his private use on his own land. Thereafter he sold the water system to one Purser, reserving to himself "the prior and preferred right to take from said system a sufficient quantity of water to properly irrigate" his own land. The Court said there was nothing illegal in this (157 Cal. 85). After the sale to Purser, the latter made a contract with Leavitt's

daughter to supply sufficient water, out of that which was appropriated for public sale and distribution, for the irrigation of another parcel of land in her possession, and she agreed to pay annually $1 per acre of so much of her land as she may have cleared or cultivated. It was provided in this contract that she "should have a priority of right to the use of water over and above all other consumers saving those who held contracts like her own." This contract was assigned to Leavitt by *both* Purser and Leavitt's daughter. Upon this state of facts the trial Court found that Leavitt was entitled to take free of charge a sufficient quantity of water during the irrigation season of each year to irrigate the land covered by the contract, and that this right was a permanent right and prior and preferred over all other rights, saving the rights of those who had contracts with Purser of like effect. (157 Cal. 87.) The Supreme Court of California held that one engaged in the business of selling and distributing water for public use could not, by the process of making contracts to furnish water and then assigning the contracts to the other contracting parties, or by any other device, confer upon them rights superior to the public use; that the public use could not be impaired or converted into a private use. (157 Cal. 89.) The Court recognized that a person or corporation engaged in the business of furnishing water for public use had the right, before the State exercised its reserved power of regulation, to make specific contracts for the furnishing of water to certain lands, and that a

landowner could acquire permanent rights to the water by contract.

The decisions of the Supreme Court of California rendered subsequent to the Leavitt case, make it clear that contracts of the character just stated are not in derogation of the public use. We refer to Southern Pacific Co. v. Spring Valley Water Co., Palermo L. & W. Co. v. Railroad Commission, and Henrici v. South Feather Land etc. Co. And we again repeat that it is conceded by plaintiffs in error that the contracts involved in the case at bar were valid when made.

AS TO ATTITUDE OF PLAINTIFFS IN ERROR CONCERNING GENERAL EFFECT OF CHANGE OF RATES ON CONTRACTS.

In the proceeding instituted before the Railroad Commission in 1921 by the Sutter Butte Canal Company, the plaintiffs in error did not, as we have shown, contend that the contracts had been completely abrogated in consequence of the increase of rates made by the Railroad Commission in 1918.

It is true that the Railroad Commission stated that plaintiffs in error claimed that "the former action of the Commission, fixing rates different from those specified in their contracts, has resulted in the complete abrogation of these contracts in all particulars." Plaintiffs in error denied in their petition for rehearing by the Railroad Commission, and in their petition for review by the Supreme Court of California, that that was a correct statement, and we have already made extracts from various portions of the transcript

showing that while there was language used by counsel for plaintiffs in error in the proceeding before the Railroad Commission to justify it in making the above quoted statement, such language was coupled with qualifications and exceptions plainly indicating that it was not the intention of plaintiffs in error to claim in that proceeding that the contracts were abrogated in all particulars. See the statements on this subject in the petition for rehearing by the Railroad Commission presented by plaintiffs in error, pages 31-2 of the transcript.

What was explicitly claimed by plaintiffs in error in the proceeding before the Railroad Commission was, as stated in another part of the Railroad Commission's decision of April 26, 1922, that by the Commission's order of March 25, 1918, the provision in the contracts "requiring payment for acreage on which water was not actually used was set aside" (Transcript, p. 14), and in the petition of plaintiffs in error for review by the Supreme Court of California that Court was asked to set aside the order of the Railroad Commission of April 26, 1922, "in so far as the same makes provision for the collection of rates upon any acreage other than that upon which water may be desired by these petitioners." (Transcript, p. 12.)

It is a reasonable implication from this that plaintiffs in error were holding to the contracts, especially to the provision thereof obligating the Sutter Butte Canal Company to continuously furnish water for the irrigation of the lands described therein, or, at any rate, to furnish the water whenever desired by the

plaintiffs in error, and it was assumed by the Railroad Commission, and also by the Supreme Court of California, that that was the position of plaintiffs in error.

It is important to keep this in mind in the consideration of this case, because we find expressions in the brief for plaintiffs in error which may be read to mean that they now treat the contracts as completely abrogated in consequence of the increase of rates made by the Railroad Commission, and that it was within the power of the Railroad Commission to completely abrogate the contracts. The following are examples of what we refer to:

> "After the exertion by the State of the power to fix rates none of the contractual obligations dependent upon or connected with the consideration upon which the contractual rates were fixed have any further force." (Page 2 of brief.)

On page 34 it is said:

> "When the State exercised its power to fix rates by law, the contracts yielded to the superior power, and none of their provisions concerning the use of water or the rates to be paid therefor, nor the provisions dependent upon or constituting a part of the consideration for those provisions, thereafter had any effective force."

On page 44 it is said:

> "The plaintiffs in error * * * maintain that because the State of California took over the regulation and control of the public use with the incidental power to fix rates, none of the old contractual obligations concerning service of water or the charge therefor have any further potency."

On page 81 it is said:

> "The plaintiffs in error raise no question concerning the power of the State either to fix public utility water rates in accordance with the principles of law governing such action, nor do they raise any question regarding the power of the State to disregard the prior contracts."

It may be, however, that plaintiffs in error do not intend that these expressions are to be construed to mean that plaintiffs in error have changed the position taken by them before the Railroad Commission and in the Supreme Court of California, for we also find the following on page 48 of the brief:

> "In the present case the contracts must yield to the superior power of the State to fix both the conditions and quantity of the public use of water and the rates to be charged therefor. It by no means follows that the contracts are invalidated, rights which have grown up under them will be protected by the courts in proper proceedings" * * *.

It is also important to keep in mind that it does not appear that plaintiffs in error had or have the right to speak for all the contract-holding consumers of the Sutter Butte Canal Company. See remarks of counsel for plaintiffs in error on this subject in the transcript, pages 63-4.

At any rate, the Railroad Commission considered that there was and is still such potency in the contracts that the Sutter Butte Canal Company was bound by them to "hold itself in readiness to serve the entire acreage covered by the contracts, and hence it is not free to dispose of, to any one else, the water

necessary to do this, and on the other hand the consumers are required to pay for the full acreage involved irrespective of whether the entire acreage be irrigated each year." (Transcript, p. 14.)

The Supreme Court of California upheld this view. It declared that the contracts "constitute a burden or servitude upon the waters of the Canal Company." (Transcript, p. 135.) The Court further said:

> "Whether or not petitioners (plaintiffs in error) used upon their lands the full amount of water which they bound themselves to pay for, it was the duty of the Canal Company, nevertheless, to hold itself in readiness to supply the water when required. * * * The duty of the Canal Company to furnish the water which it agreed to furnish by its contract remains a continuous and enforceable obligation excusable only upon the happening of some such contingency as was pointed out in Butte County Water Users' Association v. Railroad Commission, 185 Cal. 218." (Transcript, p. 141.)

The contingency here referred to is when water is not available for diversion and distribution, as, for example, when there is a drought. In such cases the water which is available is to be divided and distributed among the consumers pro rata within the limitation declared in the case just cited.

There are intimations on pages 39 and 45 of the brief for plaintiffs in error that the decision in Butte County Water Users' Association v. Railroad Commission, supra, is inconsistent with the declaration of the Supreme Court of California quoted above. There is no inconsistency between them. The Court con-

ceded and recognized in the Butte County Water Users' Association case that the contract-holding consumers had vested rights, but held that they did not have the right to say that they had a priority and preference to service of water as against new consumers because they, the contract-holding consumers, came in as consumers before the new consumers did (185 Cal. 224), provided that in taking on the new consumers the canal company did not undertake to furnish more water than its ordinary available supply would justify (185 Cal. 225); but if the canal company undertook to take on new consumers in excess of the limit of its ordinary available supply, this could not be allowed to work to the injury of the old consumers. (185 Cal. 230.)

Similar views were expressed in Gooding v. Idaho Irrigation Co., 265 U. S. 518, 524.

AS TO CONTRACT PROVISION FOR COMPUTATION OF WATER CHARGES ON WHOLE AREA OF LAND, WHETHER OR NOT THE LAND IS IRRIGATED.

Underlying the claims of the plaintiffs in error is the theory that it was not within the power of the Railroad Commission to permit the Sutter Butte Canal Company to charge any contract-holding consumer with water rates calculated on the whole area of the lands described in his contract when he may not desire to use any water thereon in any year, or when he may desire in any year to use water on only part of the land, after the contract rates have been increased by the Railroad Commission, although the

contract holder may continue to assert rights in his favor under the contract, and that the Supreme Court of California should have so declared. Put in another form, the underlying theory of plaintiffs in error is that after the Railroad Commission increased the contract rates the Commission could not permit the canal company to continue in effect, as to the new rates, the basis provided in the contracts for computing the water charges, namely, the whole area of the lands described in the contracts, whether the same be irrigated or not, notwithstanding a contract holder may claim rights under other provisions of the contracts, and that the Supreme Court of California should have so declared.

We know of no decision, and none is cited by plaintiffs in error, which holds that the Railroad Commission could not, in the exercise of its power to fix rates, and under the circumstances which existed in this case, adopt, as it did, a measure or method for computing the water charges against contract-holding consumers similar to that contained in the pre-existing contracts held by them, or that the adoption of such measure or method impairs the obligations of the contracts as asserted by plaintiffs in error, or invades any other rights secured by the Federal Constitution.

Nor do we know of any decision, and none is cited by plaintiffs in error, which holds that the Railroad Commission could not, under the circumstances of this case, change the rates fixed in the pre-existing contracts unless it set aside some other provision in the contracts which was deemed no longer desirable by plaintiffs in error after such change of rates, and

that the failure to set such provision aside impairs rights secured by the Federal Constitution.

In considering the question as to the power of the Railroad Commission to set aside or annul provisions of the contracts after the Railroad Commission has changed the rates fixed in the contracts, it must be kept in mind that if such power to set aside or annul were attempted to be exercised by the Railroad Commission in favor of contract-holding consumers, it would open the door to the canal company to demand that the remaining provisions of the contracts to which contract-holding consumers would wish to hold the canal company, be also set aside and annulled by the Railroad Commission; and thus the whole fabric of rights created by the contracts might be subject to destruction by the Railroad Commission.

The number of contracts for the service of water, gas, electricity, etc., made by public service corporations throughout the United States is infinite. A declaration by this Court that a state can, through any agency thereof, upon changing the contract rates, set aside, at the instance of either party to any such contract, any provision thereof which is no longer desirable to such party, would produce incalculable evil consequences.

It is inadmissible that the Railroad Commission can, at the instance of the canal company, terminate or disregard the right of the contract-holding consumers, acquired under their contracts, to the permanent, continuous furnishing of water for the irrigation of their lands—a right constituting an easement

appurtenant to their lands, and a servitude upon the Sutter Butte Canal Company's water and water system; a right defined as a grant of real property, which could not be lost by mere non-use. It is also inadmissible that the Railroad Commission can, at the instance of contract-holding consumers, terminate the rights of way granted by them to the canal company, or terminate or disregard the rights of the canal company to charge and collect compensation payable to it for the rights which it granted, that is, the lawful established annual rates, computed upon the whole area of the lands of the contract-holding consumers, regardless of the use made by them of the water held for their use.

For the rates lawfully established by the Railroad Commission are to be regarded as having the same effect as if they were in terms provided for in the contracts, whether those rates be more or less than the rates specified in the contracts, and the provisions of the contracts respecting the charging of the rates so specified in the contracts against the whole area of the lands covered by the contracts, and the enforcement of payment thereof, are equally effective and applicable as to the rates established by the Railroad Commission, because, as has been said by the Supreme Court of California, such contracts are necessarily made subject to the continuing power of the State to prescribe the rates at which water devoted to public use shall be furnished, "just as much so as if the contract had contained a provision expressly making it so subject".

Limoneira Co. v. Railroad Commission, 174 Cal. 232, 238.

In the case at bar, the Supreme Court of California said (Transcript, p. 138):

> "Acting within its (the Railroad Commission's) unquestionable jurisdiction it did increase the water charges by the adoption of a uniform rate scale which was made applicable to each and every acre owned by the contract holders. Its action in this particular was in strict accord with the system which was agreed upon by the petitioners. The Railroad Commission could not have acted in any other way and kept within its jurisdiction. By what authority it could have done differently than it did, so far as total acreage of each individual contract holder was concerned, has not and cannot, we think, be shown."

Speaking with reference to the provisions of Article XIV, Section 1 of the Constitution of California that "the use of water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law," the Supreme Court of California said:

> "The constitutional provision was not intended to prevent a landowner from acquiring and attaching to his land a right to the permanent use of water for its irrigation. If the right to the use of water for that purpose cannot be made permanent, but is subject to change or termination at the hands of the public authorities under the guise of regulation and control, then such use would be of little value. Water for irrigation is not ordinarily used for annual crops for which the place of use can be changed from year to year, perhaps without serious injury, but for trees, vines, and alfalfa, which must be given water each year for a series of years, to be successfully grown at all. To make land valuable

for such use, it must have the right to a permanent and continuous use of water. The constitutional provision was not intended to prevent this. The purpose was to foster and encourage such industries, rather than to hamper and obstruct them by destructive limitations upon the right of acquiring private property. * * * How far the state can go in the regulation and control of the use when thus secured by private contract it is not necessary here to decide."

Stanislaus Water Co. v. Bachman, 152 Cal. 716, 729-30.

As pointed out by this Court in Southern Pacific Company v. Spring Valley Water Co., 173 Cal. 291, 298, the power of the Railroad Commission to revise and reform contracts of public service water companies in the interest of the public is subject to the provision of Section 74 of the Public Utilities Act that "this act shall not have the effect to release or waive any right of action by * * * any person or corporation for any right * * * which may have accrued or may hereafter accrue under any law of this state." This provision in the Public Utilities Act of 1911 is retained in the existing Public Utilities Act enacted in 1915. Stats. Cal. 1915, p. 165.

The only decision of this Court which plaintiffs in error appear to rely upon as tending to support their claim that the Railroad Commission was bound to set aside the provision of the contract making the whole area of the lands of the contract-holding consumers chargeable, whether all of the land was or is irrigated or not, is N. Y. C. & H. R. R. Co. v. Gray, 239 U. S. 583. This case is of no aid to plaintiffs

in error. The Court upheld the right of Gray to recover in a civil action the unpaid balance agreed to be paid to him for his map. The fact that the railroad company was prohibited by the Hepburn Act from carrying out its agreement, valid when made, to pay Gray by giving him free transportation, did not, it was held, terminate the obligation of the company to pay the price agreed upon for the map, and it was therefore deemed proper that he should receive an equivalent in money for the balance due. It was held in effect *that the agreement stood,* modified only by the substitution of money, in place of free transportation, as the medium of payment.

In Law v. Railroad Commission, 184 Cal. 737, also cited by plaintiffs in error, the Railroad Commission made an order directing that all steam-heating consumers of the Great Western Power Company, a corporation furnishing heat in San Francisco for public use and subject to the jurisdiction of the Railroad Commission as such utility, should be charged upon a uniform basis for steam-heating service, and, in effect, prohibited deviations from the schedule of rates in favor of those holding contracts providing different rates. Law held such a contract. It had been entered into with a predecessor of the power company, to whom Law had granted the right to use free of charge parts of his building and premises, including certain wells, a smokestack, a steam and water circuit, and other appliances. It was contended by Law that if the power company retained its right given by the contract to use free of charge agencies and appliances belonging to him, the order operated to deprive him

of the use of his property without compensation and compel him, in effect, to pay a higher rate than other consumers. The Court held that the Railroad Commission had not attempted to give the power company the right to continue to use the agencies and appliances of Law under the contract, but had only done what the law permitted, namely, fixed the rate to be paid by the consumer; but that if the Railroad Commission had attempted, in addition to changing the contract rate, to give the power company the right to continue to use the agencies and appliances under the contract, (i. e., free of charge), then it would have exceeded its jurisdiction and deprived petitioner of his property without compensation and due process of law. The Court said further that in view of the change effected by the order, (the change of the rates fixed in the contract), Law had the right to rescind the contract and prevent further use of his property by the power company except for compensation "properly determined".

This decision likewise does not aid plaintiffs in error. It does not hold that the Railroad Commission has the power to annul a contract, nor does it hold that because contract rates are set aside by the Railroad Commission other provisions of the contract are or must be declared annulled. The very suggestion that Law might rescind the contract means that the contract was still effective, modified only as to the rates fixed in it. The Court did not say or intimate that the determination of the right of rescission, or to obtain compensation for the further use of Law's property, were matters to be dealt with by the

Railroad Commission. As was said by the Supreme Court of California in the case at bar (Transcript, p. 138), these are matters "for adjudication by the Courts".

If in consequence of the exercise of the rate-fixing power of the State a situation arises under pre-existing contracts from which either party thereto may desire to be relieved, the Courts of general jurisdiction, and not the rate-fixing agent of the State, are the tribunals established to pass upon and determine such matters.

> "The power *to fix rates,* when exerted, is for the public benefit, to which private contracts must yield; but it is not an independent legislative function *to vary or set aside such contracts,* however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract-impairing clause of the Constitution. The power does not exist per se. It is the intervention of the public interest which justifies, and, at the same time, conditions, its exercise."
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> Arkansas Natural Gas Co. v. Arkansas R. R. Com., 261 U. S. 379, 383.

It is true that in Law v. Railroad Commission, supra, the Court said that the effect of the exercise of the power to change rates may result "in the practical annulment" of a pre-existing contract fixing lower rates. That the Court did not mean to hold that Law's contract had been annulled by the change of the rate, is evident from the following answer of the Court to the contention that the order of the Railroad Commission would operate to allow the company to

continue to use Law's property free of charge (184 Cal. 741):

> "This, however, is not the effect of the order, which simply does what the law permits, namely, fixes the rates to be paid by the consumer, and, therefore, *nullifies the compensation fixed by the contract.*"

We observe that in the case of Arkansas Natural Gas Co. v. Arkansas R. R. Com., supra, this Court states that the effect of the exercise of the power to fix rates "may be to modify *or abrogate* private contracts, and Union Dry Goods Co. v. Georgia Pub. Serv. Corp., 248 U. S. 372, and Producers Transp. Co. v. R. R. Commission, 251 U. S. 228, are cited. In the Union Dry Goods Co. case suit was brought for specific performance of a contract, which had three years yet to run, for the furnishing of electric light and power by a public service corporation, at stipulated rates. The issue involved was whether these rates or higher rates fixed by the Georgia R. R. Commission, after the contract was made, should control. The Supreme Court of Georgia held "that the *rates* prescribed by the Railroad Commission were valid and *superseded* those of the contract between the parties". (248 U. S. 374.) This ruling was upheld by this Court. We fail to find any language in the opinion of this Court to the effect that the contract was affected in any other way than that the rates therein fixed were superseded. In the Producers Transp. Co. case the controversy was whether or not that company was a public utility, subject to the jurisdiction of the Railroad Commission of California. It was

held that the evidence showed that it was a public utility and subject to the jurisdiction of the Railroad Commission, and that the exercise of that jurisdiction could not be prevented by outstanding private contracts. No order of the Railroad Commission affecting contracts was involved. The only order made by the Railroad Commission was one directing the filing with the Commission of the company's schedule of rates or charges and its rules and regulations.

The theory of plaintiffs in error that the Railroad Commission could not change the contract rates without at the same time relieving the contract-holding consumers from the provision in the contracts that the rates shall be chargeable upon the whole area of the lands described in the contracts whether the same be irrigated or not, is inconsistent with the argument running throughout the brief for plaintiffs in error that the Railroad Commission could not *change* the terms of the contracts, excepting only that it could change the rates fixed therein. If that argument is correct as matter of law, then it must follow that the Railroad Commission cannot change the terms of the contracts by relieving the contract-holding consumers from any provision thereof which they now deem undesirable, and leaving stand the other provisions thereof favorable to the contract-holding consumers. They could not ask that they be allowed to hold fast to the rights vested in them by the contracts, and be left free to pay for the water held for their use only if and when they wanted to use it in any year, and to the extent only that they then wanted to use it.

AS TO THE LIEN PROVISION IN THE CONTRACTS.

The foregoing discussion is in the main applicable to the contention of plaintiffs in error that this provision in the contracts should have been set aside or annulled. According to the theory underlying the agreement of plaintiffs in error, that provision should have been expressly set aside by the Railroad Commission after it increased the contract rates, and, not having been set aside by it, then the Supreme Court of California should have directed the Railroad Commission to set it aside; and as that Court failed to so direct, the property of plaintiffs in error is taken without due process of law, contrary to the Federal Constitution.

Plaintiffs in error say that the contracts limit the liens to sums due or to become due to the canal company "under this contract"; that is, sums due or to become due per the rates specified in the contracts. The Supreme Court of California said in Limoneira v. Railroad Commission, supra, that the contracts were subject to the continuing power of the State to prescribe other rates, "just as much so as if the contracts had contained a provision expressly making it so subject". This, then, would justify reading the lien provision to cover not only sums due or to become due per the contract rates, but also for sums due or to become due per the rates fixed by the Railroad Commission, be they more or less than the contract rates. If they were less than the contract rates, could the canal company complain that its contract rights were impaired, or that its property was taken without due process of law? If it could not, then the contract-

holding consumers cannot complain when the rates fixed by the Railroad Commission are higher than those specified in the contracts.

It is apparent that these are purely legal questions cognizable in the Courts of general jurisdiction and not by the Railroad Commission, and in its decision the question as to whether the lien could or could not be enforced after the contract rates were raised, is not discussed therein. As was said by the Supreme Court of California (Transcript, p. 138):

> "A decision on the question of liens, as well as other questions of a purely legal character, was reserved by the Railroad Commission for adjudication by the Courts."

Nevertheless it is assumed throughout the briefs for plaintiffs in error that the Railroad Commission, with the approval of the Supreme Court of California, "*imposed*" a lien on the lands of the contract-holding consumers to secure the rates fixed by the Railroad Commission, and upon that assumption the argument is made that Federal Constitutional rights of the contract-holding consumers are invaded. The argument thus injected raises purely a moot question here.

AS TO THE ALLEGED DISCRIMINATIONS AGAINST THE CONTRACT-HOLDING CONSUMERS.

It is claimed by plaintiffs in error that the Railroad Commission arbitrarily gave the non-contract consumers privileges and advantages denied to the contract-holding consumers; that the Supreme Court of California approved this, and that thereby the

contract-holding consumers were denied the equal protection of the law, contrary to rights of the latter under the Federal Constitution.

The argument on this subject involves again the attitude of the Railroad Commission and the Supreme Court of California respecting the practice of the canal company of charging the water rates fixed by the Railroad Commission against the contract-holding consumers calculated on the whole area of the lands described in the contracts, whether the same is irrigated or not, and also involves the lien provision in the contracts.

As the argument, in so far as the lien provision is concerned, rests upon the erroneous assumption that a lien was "imposed" by the Railroad Commission, with the approval of the Supreme Court of California, upon the lands of the contract-holding consumers for the payment of the rates fixed by the Railroad Commission, we need not do more than call attention once more to the similar point discussed in Law v. Railroad Commission, supra. It will be recalled that in that case Law claimed that if he had to pay the increased rates and *if* the Railroad Commission *had given* the power company the right to continue to use Law's agencies and appliances without compensation, then the effect would be that Law would be compelled to pay more for the steam heat furnished to him than other consumers were paying. "This, however," said the Supreme Court of California (184 Cal. 741), "is not the effect of the order, which simply fixes the rates to be paid by the consumer, and, therefore,

nullifies the compensation fixed by the contract". So, in the case at bar, since the Railroad Commission did not change the contract rates *and* "impose" a lien on the lands of the contract-holding consumers for the rates fixed by the Commission, it cannot be said that any rights of the contract-holding consumers under the Federal Constitution have been invaded so far as the lien provision is concerned.

As to the claim that discrimination against the contract-holding consumers results from the practice of the canal company, sanctioned by the Railroad Commission and the Supreme Court of California, of charging the water rates fixed by the Commission against the whole area of the lands of the contract-holding consumers, whether the whole thereof is or is not irrigated in any year:

It is said in the brief for plaintiffs in error (p. 3) that (a) the Railroad Commission treats the non-contract consumers as a favored class by permitting them "to pay only for service rendered while requiring the others (the contract-holding consumers) to pay for service whether rendered or not," and (b) it is also said, in effect, that the non-contract consumers may discontinue their applications for water, or, by a subsequent application, change the extent of the former application, a privilege not possessed by contract-holding consumers.

a. Neither the contract-holding consumers nor the non-contract consumers are required to pay for service not rendered. We have already shown that there was and is uniformity in the practice of the canal company in respect to its water charges; that the contract-

holding consumers are charged the water rates applicable to them upon the area of the lands described in their contracts whether the water is used or not; that the non-contract consumers are charged the water rates applicable to them upon the area of the lands described in their applications whether the water is used or not, so long as the applications are left standing; and that the Supreme Court of California found in its final decision that this, and nothing else, was sanctioned by the Railroad Commission. That Court said that so far as the contract-holding consumers are concerned, this "was in strict accord with the system which was agreed upon by" them (Transcript, p. 138). The water to be furnished to non-contract consumers for the irrigation of the lands described in their applications is held by the canal company in readiness for such use by the non-contract consumers as long as their applications stand, and if they choose not to use it, the water rates are charged against them just as in the case of such contract-holding consumers as may choose not to use the water held in readiness for their use. As to this feature of the case, the Supreme Court of California said (Transcript, p. 138):

> "Petitioners (plaintiffs in error) impliedly, if not expressly, admit that if the contract holders had exercised their full rights and irrigated each acre of their lands without exception the objection based on unlawful discrimination would be removed. If, indeed, the number of acres which a consumer should choose to irrigate rather than the number upon which he contracted to pay a water rate is the criterion by which unlawful discrimination is to be determined, then the failure or refusal of a non-contract holder to irrigate in any one year

> a single acre included in the total acreage designated in his annual application would bring about the very result petitioners complain of. By such a rule one would be excused from performing what he agrees to do and may do that which it pleases him to do, a basis too shifting to predicate unlawful discrimination upon."

b. There is involved in this branch of the claim of discrimination the main question before the Court, that is, whether it was in the power of the Railroad Commission to set aside such provisions of the contracts as any holder thereof may deem to be undesirable after the Railroad Commission changed the rates fixed in the contracts; whether, in other words, the Railroad Commission can, at the instance of a contract holder, refashion the contract so as to retain for him such rights as he desires to retain and terminate correlative rights of the canal company. The Railroad Commission could not grant a contract-holding consumer freedom of action in the respect referred to above without assuming to exercise a power which it does not possess.

We will add in passing that the Railroad Commission did not classify contract-holding consumers and non-contract consumers for any other purpose than to give the contract-holding consumers lower rates than those fixed for non-contract consumers not making the $10 initial payment. That is not complained of here. "It is clear", said the Supreme Court of California (Transcript, pp. 141-2), "that the purpose of classification was in the interest of equalizing, as far as the situation would permit, the cost of carrying water upon the lands of all of the Canal Company's consumers. * * *

There is much to show that the entire effort of the Commission was to compose and equalize an inharmonious system brought about by various causes. * * * No design has been shown on the part of anyone to give any person an unlawful preference or unfair advantage over another or to indulge in an unlawful discrimination in any manner whatsoever."

AS TO JURISDICTION OF SUPREME COURT OF CALIFORNIA.

It is contended that that Court had jurisdiction to determine every claim asserted by plaintiffs in error respecting the rights of the contract-holding consumers under the Federal Constitution; that that Court decided otherwise, and thus failed to protect the rights of contract-holding consumers.

The decision of that Court shows that every claim asserted by plaintiffs in error under the Federal Constitution was fully dealt with by it. It considered all the circumstances of the case and declared that it was not shown that any rights under the Federal Constitution had been impaired or invaded by the order of the Railroad Commission. Plaintiffs in error, therefore, had their day in Court on every issue involved.

Detroit etc. Co. v. Fletcher Paper Co., 248 U. S. 30.

We think we are justified in saying that so much of the decision of the Supreme Court of California as deals with the provision of Section 67 of the Public Utilities Act as to the finality of findings and conclu-

sions of the Railroad Commission on questions of fact, may be regarded as surplusage. There was and is no issue of fact involved.

We respectfully submit that the writ of error should be dismissed and that the decision of the Supreme Court of California should be affirmed.

Dated, San Francisco,
September 28, 1925.

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